Supreme Court, U.S.
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NO. 01-1432 JAN 23 2002

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IN THE SUPREME COURT OF THE UNITED STATES

RAMON LOPEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

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32 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether, in light of this Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Petitioner's initial 28 U.S.C. § 2255 was properly denied and the lower court erred in refusing to issue a Certificate of Appealability where:

A. The Eleventh Circuit Court failed to acknowledge a grievous and substantial constitutional violation where the district court did not have jurisdiction to sentence the Petitioner because he was sentenced to life imprisonment for a crime to which he was not charged by the grand jury and which was not authorized by the verdict of the petit jury?

B. The rule in *Apprendi* that "any fact that increases the penalty for a crime beyond the statutory maximum, other than a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt," *id.* at 530 U.S. 466, is a substantive, rather than procedural rule and, thus, is not subject to the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989)?

C. The rule in *Apprendi* announced a new rule of constitutional law which falls within the "watershed exception" to the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 311 (1989) and, thus, may be raised on collateral review in an initial 28 U.S.C. § 2255 Motion?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i
TABLE OF CITED AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS AND STATUTES 1
STATEMENT OF THE CASE 6
INTRODUCTION 8
ARGUMENT:

I. IN LIGHT OF THIS COURT'S RULING IN *APPRENDI V. NEW JERSEY*, 530 U.S. 466 (2000), THE PETITIONER'S INITIAL 28 U.S.C. §2255 WAS IMPROVIDENTLY DENIED AND THE LOWER COURT ERRED IN REFUSING TO ISSUE A CERTIFICATE OF APPEALABILITY WHERE: 9

A. The Eleventh Circuit Court failed to acknowledge a grievous and substantial constitutional violation where the district court did not have jurisdiction to sentence the Petitioner because he was sentenced to life imprisonment for a crime to which he was not charged by the grand jury and which was not authorized by the verdict of the petit jury 9

B. The rule in *Apprendi* that "any fact that increases the penalty for a crime beyond the statutory maximum, other than a prior conviction, must be submitted to a

jury and proved beyond a reasonable doubt," *id.* at 530 U.S. 466, is a substantive, rather than procedural rule and, thus, is not subject to the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989) 14

C. The rule in *Apprendi* announced a new rule of constitutional law which falls within the "watershed exception" to the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 311 (1989) and, thus, may be raised on collateral review in an initial 28 U.S.C. § 2255 Motion 21

CONCLUSION 24

CERTIFICATE OF SERVICE 24

APPENDIX ..... [*separately bound*]

TABLE OF CITATIONS

TABLE OF CASES:

Apprendi v. New Jersey,
530 U.S. 466, 120 S.Ct. 2348,
147 L.Ed.2d 435 (2000) ..... *passim*

Bailey v. United States,
516 U.S. 137 (1995) 15

Bousley v. United States,
523 U.S. 614 (1998) 15,18

Darity v. United States,
124 F.Supp.2d 355 (W.D.N.C. 2000) 15

Davis v. United States,
417 U.S. 333 (1974) 17

Dukes v. United States,
255 F.3d 912 (8th Cir. 2001) 14

Ex Parte Bain,
121 U.S. 1 (1887) 13

Ex Parte Watkins,
3 pet. 193, 7 L.Ed. 650 (Marshal, C.J.) 14

Griffith v. Kentucky,
479 U.S. 314 (1987) 21

Hill v. United States,
368 U.S. 424 (1962) 14,17

Ingber v. Enzor,
841 F.2d 450 (2nd Cir. 1988) 19

Johnson v. United States,
520 U.S. 461(1997) 10

Jones v. Smith,
231 F.3d 1227 (9th Cir. 2000) 15

Jones v. United States,
526 U.S. 277, 119 S.Ct. 1215,
143 L.Ed.2d 311 (1999) ..... *passim*

McCoy v. United States,
266 F.3d 1245 (11th Cir. 2001) 9,10,11,14,23

Neder v. United States,
527 U.S. 1 (1999) 10,20
Olano v. United States,
507 U.S. 725 (1993) 12
Reed v. Ross,
468 U.S. 1 (1984) 18
Richardson v. United States,
526 U.S. 813 (1999) 15,16,17
Russell v. United States,
369 U.S. 749 (1960) 13,14
Saffle v. Parks,
494 U.S. 484 (1990) 22
Santana-Madera v. United States,
260 F.3d 133 (2nd Cir. 2001) 16,17
Sawyer v. Smith,
497 U.S. 227 (1990) 22
Smith v. United States,
360 U.S. 1 (1959) 11
Stirone v. United States,
361 U.S. 212, 80 S.Ct. 270,
4 L.Ed.2d 252 (1960) 13,14
Sullivan v. Louisiana,
508 U.S. 275 (1993) 11
Teague v. Lane,
489 U.S. 288 (1989) i,iii,14,15,21,22,23
United States v. Addonizo,
444 U.S. 178 (1979) 14
United States v. Bjorkman,
270 F.3d 482 (7th Cir. 2001) 10
United States v. Borja,
191 F.Supp. 563 (D.C. Guam 1961) 11
United States v. Buckland,
259 F.3d 1157 (9th Cir. 2001) 12
United States v. Clark,
260 F.3d 382 (5th Cir. 2001) 15,16

United States v. Cotton,
261 F.3d 397 (4th Cir.), *cert. granted,*
2002 WL 10623, 70 USLW 3348
(U.S. Jan. 04, 2002)(No. 01-687) 12
United States v. Cross,
916 F.2d 622 (11th Cir. 1990) 19
United States v. Fields,
242 F.3d 393 (D.C. Cir.) 9
United States v. Gaudin,
515 U.S. 506 (1995) 16
United States v. Gonzalez,
259 F.3d 360 (5th Cir. 2001) 9,12
United States v. Hearne,
6 F.R.D. 294 (E.D. Wis. 1946) 11
United States v. Hernandez,
137 F.Supp.2d 919 (N.D.Ohio 2001) 15
United States v. Jackson,
240 F.3d 1245 (10th Cir.) 12
United States v. Johnson,
457 U.S. 537 (1982) 19
United States v. Martinez,
258 F.3d 582 (7th Cir. 2001) 10
United States v. Maynie,
257 F.3d 908 (8th Cir. 2001) 12
United States v. Mojica-Baez,
229 F.3d 292 (1st Cir.), *cert. denied,*
121 S.Ct. 2215 (2001) 10,20
United States v. Moss,
252 F.3d 993 (8th Cir. 2001)) 14,15,21
United States v. Norris,
218 U.S. 619 (1930) 14
United States v. Sanders,
247 F.3d 139 (4th Cir. 2001) 15
United States v. Smith,
240 F.3d 927 (11th Cir. 2001) 19
United States v. Thomas,
274 F.3d 655 (2nd Cir. 2001) 12

United States v. Timmerick,
441 U.S. 780 (1979) 14
United States v. Vazquez,
271 F.3d 93 (3rd Cir. 2001) 10
United States v. Webb,
255 F.3d 890 (D.C. Cir. 2001) 10
Ware v. United States,
124 F.Supp.2d 590 (M.D.Tenn. 2000) 15

OTHER AUTHORITIES:

United States Constitution:
AMEND. 5 1
AMEND. 6 1

UNITED STATES CODE:

18 U.S.C. § 2 6
18 U.S.C. § 2119(2) 23
18 U.S.C. § 3147 7
21 U.S.C. § 841 11,13,19,22
21 U.S.C. § 841(a) 2
21 U.S.C. § 841(a)(1) 6
21 U.S.C. § 841(b) 2
21 U.S.C. § 841(b)(1)(B) 13
21 U.S.C. § 841(b)(1)(C) 13
21 U.S.C. § 846 5,6,8,13
21 U.S.C. § 848 17
28 U.S.C. § 1254(1) 1
28 U.S.C. § 2255 ..... i,1,7,9,19,21

RULES:

Rule 10, Sup. Ct. Rules 1
Rule 7(b), Fed.R.Crim.P. 11

OPINIONS BELOW

The unpublished order denying the Petitioner's motion for certificate of appealability was entered on August 17, 2001. (Pet. App. at 23). The Eleventh Circuit's unpublished order denying petitioner's motion for reconsideration was entered October 25, 2001. (Pet. App. at 31).

The denial pf the Petitioner's motion to vacate, set aside or reduce his sentence filed pursuant to 28 U.S.C. § 2255.

JURISDICTION

The Order Denying Motion for Certificate of Appealability of the United States Court of Appeals for the Eleventh was entered on August 17, 2001. A timely Motion for Reconsideration of order Denying Certificate of Appealability was filed on August 27, 2001, and on October 25, 2001, the Eleventh Circuit entered an order denying said Motion for Reconsideration. (Pet.App. at 23, 24-30, and 31). The jurisdiction of this Court to review a the judgment of the Eleventh Circuit is conferred under Title 28 U.S.C. § 1254(1) and Sup.Ct.Rule 10.

CONSTITUTIONAL PROVISIONS & STATUTES

U. S. Const., amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and

district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C. § 841(a) - Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 841(b) - Penalties - (Excerpt)[1]

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

* * *

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * *

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[1] The excerpts include penalties for cocaine only.

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

* * *

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, . . . except as provided in subparagraphs (A), (B), and (D), such

person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

21 U.S.C. § 846 - Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

IN THE
SUPREME COURT OF THE UNITED STATES
No. _____

RAMON LOPEZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Ramon Lopez, Defendant and Appellant in the courts below, respectfully petitions for a writ of certiorari to review the Order Denying Motion for Certificate of Appealability of the United States Court of Appeal for the Eleventh Circuit entered in this case on August 17, 2001, and Order entered on October 25, 2001, denying his Motion for Reconsideration of Order Denying Certificate of Appealability. In his appeal to the Eleventh Circuit, *Ramon Lopez* specifically argued that the quantity of drugs attributed to him violated ***Apprendi v. New Jersey,*** 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and/or ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).(See, i.e., Pet. App. at 38-61).

STATEMENT OF THE CASE

On April 24, 1997, *Ramon Lopez* together with five co-defendants, were indicted for conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §846 in Count I, and possession with intent to distribute cocaine in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 in Count II. The Indictment did not specify that any specific quantity of cocaine, nor did the Government request jury instructions or verdict forms that required the jury to determine that element of the offenses charged. (91CR317-DE 1).

After a modified *Allen* charge was administered on the third day of deliberations, the jury convicted *Lopez* on both counts, but

acquitted his co-defendants, Nancy Garcia and Orosco-Zapata[2] (91CR317-DE 232,233,235).

The trial court sentenced *Lopez* to concurrent terms of life imprisonment, to be followed by five years supervised release. Further, pursuant to the Government's notice of intent to seek sentencing enhancement under 18 U.S.C. §3147, the trial court sentenced *Lopez* to a consecutive six month term of incarceration. (91CR317-DE-1,265). *Lopez* is presently incarcerated serving the sentence imposed in this cause.

On April 24, 1997, *Lopez* filed a *pro se* motion to vacate, reduce or set aside his sentence pursuant to 28 U.S.C. § 2255 (hereinafter "2255 motion"), raising, inter-alia, that *Lopez* was denied effective assistance of trial counsel;[3] in that trial counsel failed to investigate and challenge charges in the indictment at pre-trial and trial stages of the proceedings. (91-CR-317/97-CIV-1422-DE-318 at p. 6).

Thereafter, *Lopez* retained counsel and on July 20, 1998, *Lopez* filed a motion for leave to invoke discovery and/or expand the record pursuant to Rules 6 and 7 of the Rules governing 2255 proceedings in order to obtain and introduce evidence within the Government's possession and control of his first trial counsel's conflict of interest and ineffectiveness in failing to advise Lopez that the government provided him a written plea agreement after Lopez was debriefed. (91CR317-DE-345,346,350,351).

Without ruling on *Lopez'* motion for leave to invoke discovery and/or expand the record, on December 18, 1998, the Magistrate Judge entered a Report and Recommendation denying *Lopez'* 2255 Motion, (DE-3), and *Lopez* filed a motion for reconsideration of said Report and Recommendation. (91CR317-DE-356).

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[2]Three of the originally charged codefendants, Gerardo Machado, Redelio Garcia and Luz Mary Del Pino, plead guilty. (91CR317-DE 192). However, at trial, two of the three who plead guilty testified for *Lopez* and one testified for the Government. (91CR317-R5-396, R10-1089-90,1173).

[3]Referred to in the Record as Claim V of Lopez' 2255 Motion.

The District Court then entered an Omnibus Order granting, in part, *Lopez'* motion for reconsideration, but denying his motions for leave to invoke discovery and/or expand record, and to stay pending ruling on disclosure of discovery in related matter. (91CR317-DE-358). The order remanded *Lopez'* ineffective assistance of counsel claim[4] back to the Magistrate Judge for further consideration. *Id.*

On June 21, 2000, the Magistrate Judge entered a Supplemental Report and Recommendation denying Claim V of Lopez' 2255 Motion without an evidentiary hearing, to which Lopez filed written objections. (91CR317-DE-380,384,387). The District Court then entered an Order summarily denying the written objections. (91CR317-DE-388). Thereafter, *Lopez* moved for leave[5] to file a motion for reconsideration and further supplement his 2255 Motion with an *Apprendi* claim. Those requests were likewise summarily denied. (91CR317-DE-389-90). Thereafter, this appeal ensued, and the District Court denied Lopez' a Certificate of Appealability. (91CR317-DE-391).

INTRODUCTION

The Petitioner in this case, Mr. Lopez (hereinafter referred to as "Petitioner" or "Mr. Lopez") is presently serving a life sentence for conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846, and possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1), where neither the indictment charged nor the jury instructions required the jury to find any quantity of drugs. As a result, the statutory maximum sentence under the charging statute is 20 years. Accordingly, the life sentence imposed in the instant case violates the Constitution. If this sentence is left in place, Mr. Lopez will serve untold years in prison, beyond that authorized by the charging statute and the jury's verdict. Petitioner states that such an outcome, violative of his Due Process rights, should not stand. The issue squarely before the Court is whether such a grievous unconstitutional outcome will be addressed on the merits and corrected, or whether it will be permitted to stand

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[4]Referred to in the Record as Claim V of Lopez' 2255 Motion.

[5]The Clerk had sent the Order to the undersigned's previous address. Therefore, the Order was not received within 10 days of its entry, and leave was accordingly sought.

on conflicting procedural interpretations regarding collateral review and procedural default doctrines.

ARGUMENT

I. IN LIGHT OF THIS COURT'S RULING IN *APPRENDI V. NEW JERSEY*, 530 U.S. 466 (2000), THE PETITIONER'S INITIAL 28 U.S.C. § 2255 WAS IMPROVIDENTLY DENIED AND THE LOWER COURT ERRED IN REFUSING TO ISSUE A CERTIFICATE OF APPEALABILITY WHERE:

A. The Eleventh Circuit Court failed to acknowledge a grievous and substantial constitutional violation where the district court did not have jurisdiction to sentence the Petitioner because he was sentenced to life imprisonment for a crime to which he was not charged by the grand jury and which was not authorized by the verdict of the petit jury.

The Eleventh Circuit's held in ***McCoy v. United States,*** 266 F.3d 1245, 1249 (11th Cir. 2001), that ***Apprendi*** errors are not jurisdictional and are subject to plain error review where the sentence will not be disturbed where the *court* deems the evidence of drug quantities adduced at trial sufficient to support the sentence imposed even if such evidence was neither charged in the indictment, nor submitted to the jury for a beyond a reasonable doubt determination. Such a ruling directly conflicts with the Fifth Circuit's holding in ***United States v. Gonzalez,*** 259 F.3d 355 (5th Cir. 2001), that "the district court lacks the jurisdiction to impose a sentence exceeding the statutory maximum of the offense alleged in the indictment..." *Id.* at 360-61, n. 3. Moreover, the split in the Courts on this issue extend well beyond the Fifth and Eleventh Circuits. The District of Columbia, First, Third and Seventh Circuit Courts have generally followed the Eleventh Circuit in holding that there is no jurisdictional defect in trying and sentencing a defendant based on quantities of drugs neither alleged in the indictment, nor submitted to the jury because the federal courts retain subject matter jurisdiction to hear a case once an indictment is returned by the grand jury. *See* ***United States v. Fields,*** 242 F.3d 393 (D.C. Cir.), *aff'd and amended on reh'g,* 251 F.3d 1041 (D.C. (Cir. 2001)(the court

remanded where the evidence "as to quantity was not so overwhelming"). 251 F.3d 1045. In a later case, however, the court, applying the analysis of ***Johnson v. United States,*** 520 U.S. 461 (1997), declined to grant relief because the evidence of drug quantity was overwhelming and had not been contested at trial or sentencing. ***United States v. Webb,*** 255 F.3d 890, 900-01 (D.C. Cir. 2001). *See also* ***United States v. Mojica-Baez,*** 229 F.3d 292 (1st Cir.), *cert. denied,* 121 S.Ct. 2215 (2001)(concluding that failure of grand jury to charge an element of the offense is not a structural error), *id.* at 311; ***United States v. Vasquez,*** 271 F.3d 93 (3rd Cir. 2001)(citing ***Neder*** and rejecting the contention that ***Apprendi*** error should be treated as structural. *Id.* at 103, denied relief based on the evidence of quantity adduced at trial. *Id.* at 104); ***United States v. Bjorkman,*** 270 F.3d 482 (7th Cir. 2001)(rejected argument that, where the indictment did not charge quantity, the district court lacked subject matter jurisdiction). *Id.* at 490.

Applying a plain error standard of review, these Circuits have generally held that failure to charge quantity in the indictment is not a jurisdictional defect, and that such error is subject to plain error review where the sentence will not be overturned when the evidence as to quantity adduced at trial is "overwhelming" or "whether the evidence was sufficiently conclusive to support the sentence actually imposed." The Eleventh Circuit, feeling itself constrained to follow ***Neder v. United States,*** 527 U.S. 1 (1999),[6] joined with the First and Seventh Circuit Courts to arrive at the conclusion that an appellate court can be confident in retrospect that a grand jury *would* have returned an indictment charging the requisite quantity whenever the trial evidence was so strong that the petit jury *would* have been bound to reach the same conclusion. *See* ***McCoy*** at 1251, *quoting* ***United States v. Martinez,*** 258 F.3d 582, 587 (7th Cir. 2001). In doing so, these lower courts have impermissibly replaced *all* Constitutionally required triers of fact with their pure speculation

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[6]Erroneous jury instructions that omit element of the offense is subject to harmless error analysis. ***Neder*** 527 U.S. at 10.

concerning a hypothetical jury's actions.[7]

In ***McCoy***, the Eleventh Circuit came to the conclusion that ***Apprendi*** error based upon an indictment that does not notice an element of the offense (such as drug quantity in the §841 context) is not jurisdictional in nature. The Court reached that conclusion based upon the following analogy:

> [t]he constitutional right to be charged by a grand jury is a personal right of the defendant and does not go to the district court's subject matter jurisdiction because it may be waived. *See* Fed.R.Crim.P. 7(b). Thus, the constitutional right to be charged by a grand jury indictment simply does not fit the mold of a jurisdictional defect, because it is a right that can be waived.

Id. at 1249.

The opinion neglects to mention that when a defendant waives indictment, it is replaced with an information which serves, at the very least, as legally sufficient notice to the defendant of the charges which he must face and their penalties, and preserves a defendant's right to challenge jurisdictional defects See, ***United States v. Borja,*** 191 F.Supp. 563 (D.C. Guam 1961); and ***United States v. Hearne,*** 6 F.R.D. 294 (E.D. Wis. 1946). Therefore, it is axiomatic that requiring *neither* an indictment, *nor* an information *would* constitute a structural error of the highest degree -- particularly in the sentencing context. Further, merely retaining subject matter jurisdiction to *try* the case does not mean that the district court retains jurisdiction to *sentence* the defendant when such a sentence

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[7]*See* ***Smith v. United States,*** 360 U.S. 1, 9 (1959)("the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules"). *See also* ***Sullivan v. Louisiana,*** 508 U.S. 275, 310 (1993)(finding that where an instructional error consists of a misdescription of the burden of proof, "a reviewing court can only engage in pure speculation [regarding] what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty'"), *internal citations omitted*; ***Sullivan v. Louisiana,*** 508 U.S. 275, 280 (1993)(in a case finding that defective reasonable doubt instructions to the jury constituted structural error, this Court held that "[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action...").

would be based on charges not stated in the indictment or the information (if the indictment were waived), nor authorized by the jury's verdict. *See* ***Gonzalez,*** 259 F.3d at 360-61.

The Second, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits, on the other hand, have generally recognized the jurisdictional defect inherent in indictments which do not specify quantity, and the concomitant prohibition on sentencing the defendant for an offense greater than that charged by the grand jury. These Circuits have not explicitly ruled that it is a jurisdictional defect, but after applying the plain error factors prescribed in ***Olano v. United States,*** 507 U.S. 725 (1993), have held that such is *per se* reversible error. Petitioner respectfully suggests that such is the only correct result consistent with the Fifth Amendment grand jury guarantee. *See* ***United States v. Thomas,*** 274 F.3d 655, 672 (2nd Cir. 2001), *en banc,* (finding error in sentencing where the district court imposed a sentence it had no authority to impose; and finding error in conviction of a defendant for a crime different than the crime charged in the indictment). *See also* ***United States v. Cotton***, 261 F.3d 397, 403-07 (4th Cir.), *cert. granted,* – S.Ct. –, 2002 WL 10623, 70 USLW 3348 (U.S. Jan. 04, 2002)(No. 01-687)(concluding that, where quantity is not charged in the indictment, the defect inherent in sentencing a defendant for a crime with which he was not charged is so fundamental as to always require correction under the plain error standard, no matter how strong the quantity evidence at trial); ***United States v. Gonzalez,*** 259 F.3d 355, 360-61, n. 3 (5th Cir. 2001)(noticing jurisdictional nature of ***Apprendi*** error in the indictment and sentencing context); ***United States v. Maynie,*** 257 F.3d 908, 921 (8th Cir. 2001)(finding ***Apprendi*** error because "a judge lacks the authority to sentence a defendant to an uncharged crime"); ***United States v. Buckland,*** 259 F.3d 1157, 1163-68 (9th cir.), *reh'g en banc granted,* 265 F.3d 1085 (9th Cir.)(finding 21 U.S.C. § 841 facially unconstitutional because of the "structure of the statute itself" combined with its legislative history); and, ***United States v. Jackson,*** 240 F.3d 1245, 1248-49 (10th Cir.), *cert. denied,* 122 S.Ct. 112 (2001)(holding that ***Apprendi*** error, where the greater offense is not charged in the indictment, requires resentencing on the lesser offense, without harmless or plain error review, as such

sentences are "unauthorized").

The applicability of ***Apprendi*** to the instant case is clear. The counts upon which Mr. Lopez was found guilty did not reference any amount of cocaine. No drug quantity was alleged in the indictment. *Not one* overt act listed any quantity of drugs. Moreover, the issue of quantity of drugs was never submitted to the jury. In the 21 U.S.C. § 841 context, where the quantity of drugs is not charged in the indictment, a defendant has not been charged with a crime punishable under § 841(b)(1)(B). It follows, therefore, that Mr. Lopez may not be consistently be sentenced to more than the maximum of 20 years provided in the default provisions of § 841(b)(1)(C) which does not require any particular amount of controlled substance to be charged of proven. Where the indictment alleges only the lesser offense, sentencing Mr. Lopez for the uncharged, greater offenses, was effectively a constructive amendment of the indictment, which under ***Ex Parte Bain,*** 121 U.S. 1 (1887)[8], ***Stirone v. United States,*** 361 U.S. 212 (1960)[9], and ***Russell v. United States,*** 369 U.S. 749 (1960)[10] is forbidden.[11] Mr.

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[8]The failure of the Grand Jury to charge the defendant with the elements of an offense is a jurisdictional bar to prosecution for that offense which has been settled by this Court since its decision in ***Bain:*** an indictment found by the grand jury is "indispensable to the power of the court to try the petitioner for the crime with which he is charged." *Id.* 121 U.S. at 12.

[9]This Court explicitly reaffirmed ***Bain*** in ***Stirone***, explaining that the very purpose of the Fifth Amendment grand jury clause was to limit a defendant's "jeopardy to offenses charged by a group of his fellow citizens acting independently of either the prosecuting attorney or judge." *Id.* at 218. Here, the Court concluded that the deprivation of the defendant's "substantial right to be tried only on charges presented in an indictment returned by a grand jury...is far too serious to be...dismissed as harmless error." *Id.* at 217.

[10]The principle of ***Bain*** and ***Stirone***—that an indictment charging all of the essential elements is a prerequisite to conviction for that offense—was again reaffirmed in ***Russell*** at 764-65 ("an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, *unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense to be punished*;"), internal citations omitted; emphasis added.. This principle was reaffirmed in ***Apprendi*** itself: "[t]he judge's role in sentencing is constrained at its outer limits

Lopez was therefore sentenced to life imprisonment on these counts in violation of the due process and grand jury clauses of the Fifth Amendment and of the jury trial guarantee of the Sixth Amendment. These constitutional violations require vacating Mr. Lopez' sentence without a showing of prejudice. *See* ***Stirone*** at 217.

This issue is of grave import to the Petitioner because the district court lacked jurisdiction to impose a sentence for a crime for which was not charged, and, inasmuch as lack of jurisdiction can be raised at any time[12], then this Court need not reach any other issue.

B. THE RULE IN *APPRENDI* THAT "ANY FACT THAT INCREASES THE PENALTY FOR A CRIME BEYOND THE STATUTORY MAXIMUM, OTHER THAN A PRIOR CONVICTION, MUST BE SUBMITTED TO A JURY AND PROVED BEYOND A REASONABLE DOUBT, *ID.* AT 530 U.S. 466, IS A SUBSTANTIVE, RATHER THAN PROCEDURAL RULE AND, THUS, IS NOT SUBJECT TO THE NON-RETROACTIVITY DOCTRINE OF *TEAGUE V. LANE*, 489 U.S. 288 (1989).

Whether the ***Teague*** doctrine on retroactivity applies to bar Petitioner's ***Apprendi*** claim is a matter not yet address by the majority of the Circuit Courts. Those that have reached this issue have held that retroactive application of ***Apprendi*** is barred by ***Teague***. *See* ***McCoy v. United States,*** 266 F.3d 1245 (11th Cir. 2001)(10 year sentence); ***Dukes v. United States,*** 255 F.3d 912 (8th Cir. 2001)(life sentence); ***United States v. Moss,*** 252 F.3d 993, 997

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by the facts alleged in the indictment and found by the jury." *Id.* 530 U.S. at 483, n. 10.

[11]It is a "well settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." ***Russell v. United States,*** 369 U.S. 749, 770 (1962), *citing* ***Bain*** at 10, ***United States v. Norris,*** 281 U.S. 619, 622 (1930), *and* ***Stirone*** at 218.

[12]*See* ***United States v. Timmerick***, 441 U.S. 780, 783 (1979)(acknowledging fundamental nature of jurisdictional error which can be raised on collateral review). *Citing* ***Hill v. United States,*** 368 U.S. 424 (1962). *See also* ***United States v. Addonizo,*** 444 U.S. 178, 185 (1979)(same), *citing, Ex Parte Watkins,* 3 Pet. 193, 202-203, 7 L.Ed. 650 (Marshal, C.J.).

(8th Cir. 2001)(360 month sentence); ***United States v. Sanders,*** 247 F.3d 139, 147 (4th Cir. 2001)(188 month sentence); and ***Jones v. Smith,*** 231 F.3d 1227, 1236 (9th Cir. 2000)(life sentence). The threshold, inquiry, therefore, is whether the rule annunciated in ***Apprendi*** is substantive or procedural. *See* ***Bousley v. United States,*** 523 U.S. 614, 620-21 (1998)(holding that substantive rules are automatically applied retroactively, procedural rules generally are not).

Few courts that have addressed the retroactivity of ***Apprendi*** have considered whether the rule is substantive or procedural. *See* ***United States v. Clark,*** 260 F.3d 382 (5th Cir. 2001)(Parker, J., *dissenting*)(in a case where the district court remanded for further consideration, Judge Parker opined that ***Aprendi*** announces a new substantive rule, and that ***Teague's*** prohibition against retroactivity does not apply. He further stated that the matter should not be remanded, because the court could directly address the underlying claims without further delay. Judge Parker based his conclusion on the prior precedent retroactively applying ***Richardson v. United States,*** 526 U.S. 813, (1999) and ***Bailey v. United States***, 516 U.S. 137 (1995), and the risk that a person may be subjected to the maximum term of ten years to life imprisonment while being "actually innocent" of a sentencing enhancement while guilty of the underlying offense). *Id.* at 383-389. *See also* ***United States v. Hernandez,*** 137 F.Supp.2d 919, 928-29 (N.D.Ohio 2001); ***Darity v. United States,*** 124 F.Supp.2d 355, 360-61 (W.D.N.C. 2000), *overruled by* ***United States v. Sanders,*** 247 F.3d 139 (4th Cir. 2001); ***Ware v. United States,*** 124 F.Supp.2d 590, 595-96 (M.D.Tenn. 2000)

Most courts, centering on the majority's statement in ***Apprendi*** that "[t]he substantive basis for New Jersey's enhancement is thus not an issue; the adequacy of New Jersey's procedure is," ***Apprendi*** 530 U.S. at 475, have summarily concluded that the rule is procedural and have analyzed ***Apprendi*** using the ***Teague*** framework and its two exceptions. *See ante.* Most significantly, however, the ***Teague*** analysis does not apply to substantive rules, such as those construing the meaning of federal criminal statutes. *See* ***Bousley***, 523 U.S. at 620 ([B]ecause ***Teague*** by its terms applies only to procedural rules, we think it is inapplicable to the situation in which

this Court decides the meaning of a criminal statute enacted by Congress"). Petitioner therefore submits that the primary feature of the new rule is its substantive construction of federal criminal statutes and that the rule is therefore retroactive.

As the ***Clark*** dissent points out, the procedural part of the ***Apprendi*** rule – that a criminal defendant is entitled to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt," ***Apprendi,*** 530 U.S. at 477 (alteration in original)(*quoting* ***United States v. Gaudin,*** 515 U.S. 506, 510 (1995)) – is not new: it is merely a recitation of the procedural guarantees contained in the Fifth, Sixth, and Fourteenth Amendments. ***Clark*** at 386. The new part of the ***Apprendi*** rule, however, is the Supreme Court's application of this long-recognized constitutional principle. By holding that any fact that increases the maximum punishment for an offense must be submitted to a jury and proven beyond reasonable doubt, this Court added substantive elements to every criminal statute purporting to allow a judge acting alone to impose punishment in excess of the statutory maximum. *Id.* The Court explained in ***Apprendi*** that a sentencing factor that increases the maximum punishment for an offense is the "functional equivalent of an element of a greater offense than the one covered by the jury's verdict. Indeed, it fits squarely within the usual definition of an 'element' of the offense." ***Apprendi,*** 530 U.S. at 494, n. 19. Since the ***Apprendi*** rule interprets the meaning of a multitude of criminal statutes, including the statutes at issue here, Petitioner believes it is a substantive rule of law retroactively applicable to cases on collateral review.

This result would be consistent with the Second Circuit's recent decision in ***Santana-Madera v. United States,*** 260 F.3d 133 (2nd Cir. 2001),[13] that the new rule announced by the Supreme Court in ***Richardson v. United States,*** 526 U.S. 813 (1999), is substantive and therefore retroactive. Prior to ***Richardson,*** a jury deciding whether a defendant had engaged in a continuing criminal enterprise

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[13] ***Santana-Madera*** did expressly not reach the issue of whether or not ***Apprendi*** could be retroactively applied, leaving that "for another day." *Id.* at 135.

("CCE") in violation of 21 U.S.C. § 848 was required to unanimously agree that the defendant committed at least three federal narcotics violations, but it was not required to agree as to which specific violations constituted the offense. ***Santana-Madera*** at 136. In ***Richardson***, this Court found such a practice to be unconstitutional, holding that each of the violations making up the series was a separate element of the CCE offense that must be unanimously agreed upon by the jury. ***Richardson,*** 526 U.S. at 818-19, 824. The Second Circuit concluded in ***Santana-Madera*** that because ***Richardson*** "interpreted a federal criminal statute and, in doing so, changed the elements of the CCE offense" it "alter[ed] the meaning of the substantive criminal law," and was therefore retroactively applicable on collateral review. ***Santana-Madera*** at 138. Because it was implicit in the jury's verdict in ***Santana-Madera*** that the jurors agreed that the defendant was guilty of at least three narcotics violations, the issue was not whether the defendant had potentially been convicted of conduct which was not legal, but rather, whether each member of the jury had the same series of violations in mind when they voted to convict. As a result, the Second Circuit's determination that the ***Richardson*** rule is substantive conforms with Petitioner's view that decriminalization of conduct is not an essential characteristic of a "substantive" rule.

Moreover, this appears to be the correct result under ***Davis v. United States,*** 417 U.S. 333 (1974), which first established the principle that a substantive change in the law is applicable to cases on collateral review. There is nothing in ***Davis*** that expressly limits substantive rules to those rules that decriminalize conduct previously thought to be illegal. Applying ***Davis***, the appropriate inquiry is not whether the new rule decriminalizes conduct, but rather, whether the error of law sought to be raised is "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t present[s] exceptional circumstances where the need for remedy afforded by the writ of habeas corpus is apparent." ***Davis,*** 417 U.S. at 346 (alteration in original)(*quoting* ***Hill v. United States,*** 368 U.S. 424, 428 (1962)).

In the case at bar, Mr. Lopez is the victim of a genuine ***Apprendi*** error and, thus, meets the ***Davis*** test. The unconstitutional

length of his life imprisonment rests on a purely judicial finding made using the lowest standard of proof known to our judicial system. Accordingly, Petitioner has been deprived of his liberty without the benefits of the heightened protections that are the hallmarks of American jurisprudence. While the lower courts may view legitimate ***Apprendi*** claims as rare, the flood of, perhaps, unmeritorious claims does not alter the fact that ***Apprendi*** represents substantive change in the law that is retroactively applicable on collateral review.

Although the Petitioner has shown that he is entitled to the benefit of the ***Apprendi*** rule on collateral review, he must also show both cause for failure to raise the issue on direct appeal, and actual prejudice resulting therefrom. ***Bousley v. United States,*** 523 U.S. 614, 622 (1998).

Cause:

Petitioner has established cause sufficient to excuse his failure to raise the ***Apprendi*** issue on direct appeal under the rule of ***Reed v. Ross,*** 468 U.S. 1 (1984). In ***Reed***, this Court held that the novelty of a constitutional claim can constitute cause for failure to raise it on direct review if the claim's "legal basis [was] not reasonably viable to counsel." *Id.* at 16. To hold otherwise, this Court stated, would disrupt criminal proceedings by "encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition." *Id.* at 15-16. This Court further stated that when it articulates a constitutional principle which:

> 'overturns . longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved...' there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a [lower] court to adopt the position that this Court has ultimately

> adopted. Consequently, the failure of a defendant's attorney to have pressed such a claim before a [lower] court is sufficiently excusable to satisfy the cause requirement.

Id. at 17, *quoting*, ***United States v. Johnson,*** 457 U.S. 537, 551 (1982). *Accord* ***Ingber v. Enzor,*** 841 F.2d 450, 454-55 (2nd Cir. 1988)(penalizing a § 2255 petitioner for failing to challenge a decade of entrenched precedent on direct appeal would "ascribe to attorneys...the power to prognosticate with greater precision than judges of this court" and would "encourage appeal of even well-settled points of law").

Such is the situation presented in the instant case. Prior to ***Apprendi***, all twelve circuit courts had specifically rejected the argument that drug quantity was an element of the offense under 21 U.S.C. § 841. To now penalize Petitioner for failing to raise an ***Apprendi*** claim on appeal when that argument had been foreclosed by the Eleventh Circuit[14] (and every other court in the country) would be unjust and produce an undesirable result. As this Court noted in ***Reed***, such a policy would thwart judicial economy in criminal proceedings. Defense lawyers would have to choose between raising every remotely conceivable constitutional claim at trial and on appeal, including those precluded by binding precedent, or being subjected to claims for malpractice and ineffective assistance of counsel in the event this Court eventually recognizes a right that might have benefitted their client had they anticipated it long before.[15] Accordingly, inasmuch as the Petitioner was foreclosed by

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[14]*See* ***United States v. Cross,*** 916 F.2d 622, 623 (11th Cir. 1990).

[15]One can also envision appellate and post-conviction counsel running afoul of court proscriptions by filing what could be considered as frivolous arguments against binding precedent. *See* Fed.R.Civ.P. 11(e). *See also* ***United States v. Smith,*** 250 F.3d 1073 (7th Cir. 2001), Wood, J., *dissenting* ("fear[ing]...administrative nightmare...[as] defense counsel will have no choice but to file one 'kitchen sink' brief after another" to avoid "a procedural default that cannot be overcome for good cause."). *Id.* at1077.

firmly entrenched precedent from raising the ***Apprendi*** issue on direct appeal, he has demonstrated cause sufficient to excuse his failure to raise the issue on direct appeal.

Mr. Lopez is serving a term of life imprisonment based upon an indictment that omitted an essential element of the offense with which he was charged and which the jury verdict did not authorize. Thus, in the instant case, a quintessential jurisdictional error occurred. As Judge Arnold's well-reasoned *dissent* in ***United States v. Moss,*** 252 F.3d 992 (8th Cir. 2001) so aptly stated when calling into doubt the majority's opinion:

> The Supreme Court in ***Neder v. United States,*** 527 U.S. 1, 8-9...(1989), has held that it is not always reversible error to fail to submit to a jury an essential element of a criminal offense. If, for example, no reasonable jury could have found against the prosecution with respect to this element, the error can be treated as harmless. The same thing, however, cannot be said of the other part of the ***Apprendi*** principle – that every element of a crime must be charged in an indictment (if the crime is federal). *As far as I am aware, no case has ever held that the omission of an element of a crime from an indictment can be harmless error. In such cases, we do not ask whether a jury would have found that element on the evidence submitted to it, or, indeed, whether the grand jury would have returned an indictment including that element if it had been asked to do so. Rather, an indictment that*

> *omits an element of a crime is structurally deficient and provides no lawful basis for bringing anyone to trial. Failure to include an essential in a federal indictment warrants relief even if the government later proves the omitted element at trial.*

Moss, 252 F.3d at 1005. (Internal citation omitted). (Emphasis added).

If, under these circumstances, Petitioner's life sentence does not constitute significant prejudice, he respectfully submits that such a prejudicial threshold is "beyond the pale" in current American jurisprudence.

C. THE RULE IN *APPRENDI* ANNOUNCED A NEW RULE OF CONSTITUTIONAL LAW WHICH FALLS WITHIN THE "WATERSHED EXCEPTION" TO THE NON-RETROACTIVITY DOCTRINE OF *TEAGUE V. LANE*, 489 U.S. 288, 311 (1989) AND, THUS, MAY BE RAISED ON COLLATERAL REVIEW IN AN INITIAL 28 U.S.C. § 2255 MOTION.

Alternative, Mr. Lopez submits that the new rule of law announced in ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000), that "any fact that increases the penalty for a crime beyond the statutory maximum, other than a prior conviction, must be submitted to the jury and proved beyond a reasonable doubt" [*id.*], falls within the "watershed exception" to the non-retroactivity doctrine of ***Teague v. Lane,*** 489 U.S. 288 at 311 (1989). The applicability of ***Apprendi*** to drug cases raises the question of whether the courts must retroactively apply the new rule to similarly situated defendants who, like the Petitioner, have submitted this issue on an initial Title 28 U.S.C. § 2255 Motion To Vacate, Correct or Set Aside an Illegal Conviction and/or Sentence.

Generally, new constitutional rules of criminal procedure apply retroactively only to cases which are on direct state or federal appeal at the time the rule is announced. *See* ***Griffith v. Kentucky,*** 479 U.S. 314 (1987). A new rule is not to be applied retroactively on collateral review unless the rule falls within one of two narrow

exceptions: (1) the new rule places certain kinds of primary conduct beyond the power of the criminal lawmaking authority to proscribe, or (2) the rule requires the observance of "those procedures that...are 'implicit in the concept of ordered liberty.'" ***Teague,*** 489 U.S. at 305-310 (*citations omitted*). The first exception to the general rule prohibiting retroactivity applies only to rules that decriminalize a class of conduct or prohibit certain category of punishment for a class of defendants because of their status or offense. *See* ***Saffle v. Parks,*** 494 U.S. 484, 495 (1990). Petitioner concedes this exception is inapplicable to the instant case. However, the ***Apprendi*** decision does implicate the second exception, which applies to those "watershed rules of criminal procedure" which "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding" and "without which the likelihood of an accurate conviction is seriously diminished." ***Sawyer v. Smith,*** 497 U.S. 227, 242-244 (1990), *quoting* ***Teague,*** 489 U.S. at 311, 315. The Court in ***Apprendi*** concluded that the Constitution requires a jury finding on any fact which increases the statutory maximum penalty. This conclusion compels a radical shift in criminal procedure in federal cases.[16] Such a sweeping new requirement is so grounded in fundamental fairness that it may be considered of "watershed importance."

Apprendi raises the standard for determining elements that subject a criminal defendant to a higher term of imprisonment from a preponderance of the evidence to beyond a reasonable doubt. ***Apprendi*** requires such elements to be determined by a jury, thereby enforcing a defendant's right to trial by jury on such issues. Moreover, the requirement that every element of a crime, defined as every fact that increases the statutory maximum, be charged in the indictment improves the accuracy of the fact-finding process because it reduces the risk that an innocent person might be convicted of a more serious crime, or that a guilty person might be punished more severely than the law allows. Indeed, in ***Apprendi*** this Court stated

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[16]As noted in §B, *supra*, prior to this Court's ***Apprendi*** ruling, all twelve circuit courts had specifically rejected the argument that drug quantity was an element of the offense under 21 U.S.C. § 841.

"[a]t stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury,' Amdt. 6." ***Apprendi*** 530 U.S. at 476-477. Most significantly, four justices almost explicitly endorsed a ***Teague*** exception for ***Apprendi*** claims in their reading of the majority opinion by stating "[t]oday, in what will surely be remembered as a *watershed* change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in ***Jones***."[17] ***Apprendi,*** 530 U.S. at 524 (O'Connor, J., *dissenting*)(emphasis added). A decision, such as ***Apprendi***, which overturned well-settled precedent in all twelve circuit courts, can hardly be considered as non-substantive or usual. Indeed, the Eleventh Circuit's unconstitutional hurdle, as established in ***McCoy,*** barring defendants from collaterally attacking sentences and conviction arrived at in an unconstitutional manner, has created a split within the circuits for those who, like the Petitioner herein, raised their ***Apprendi*** claims in § 2255 motions. Thus, it is time for this Court to resolve the Circuit conflicts and address the retroactivity of ***Apprendi***:for defendants raising same on collateral review.

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[17]In ***Jones v. United States,*** 526 U.S. 277 (1999), this Court first identified the principle that "any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt." *Id.* U.S. at 243, n. 6. The Court held that serious bodily injury under the federal car-jacking statute, *see* 18 U.S.C. § 2119(2), is an element of the offense, not a sentencing factor, which must be charged in an indictment and submitted to the jury. *Id.* at 251-252.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court grant certiorari, review herein.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* Express Mail, this 23rd day of January, 2002, to: ***Susan Ponzoli, Assistant United States Attorney,*** Appellate Division, 99 Northeast Fourth Street, Miami, Florida 33132, and ***Solicitor General***, Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530.

RHONDA A. ANDERSON, ESQ.
Counsel for *Ramon Lopez*

(2) Supreme Court, U.S.
FILED

011432 JAN 23 2002

OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAMON LOPEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

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33 pp

TABLE OF CONTENTS

- Ramon Lopez's Application for Certificate of Appealability dated March 2, 2001 1-22

- Eleventh Circuit Order Denying Motion for Certificate of Appealability entered August 17, 2001 23

- Ramon Lopez's Motion for Reconsideration of Order Denying Certificate of dated August 27, 2001 24-30

- Eleventh Circuit Order Denying Motion for Certificate of Appealability entered October 25, 2001 31

CASE NO. 00-16074-F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RAMON LOPEZ,
Appellant/Defendant.

vs.

UNITED STATES OF AMERICA,
Appellee/Plaintiff,

On Appeal From The United States District Court
For The Southern District of Florida,
Case No. 97-01422-CV-UUB/91-00317-CR-UUB

APPLICATION FOR CERTIFICATE OF APPEALABILITY

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CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for the Appellant, RAMON LOPEZ, hereby certifies pursuant to Eleventh Circuit Rule 26-1.1 that the following is a complete list of persons and entities who have an interest in the outcome of this case:

Rhonda A. Anderson, Esq., Counsel-2255 proceedings

Hon. Ursula Ungaro-Benages, District Court Judge-2255 Proceedings

Joel Arthur Berger, Esq., Appellant Counsel-Crim. Case

Dawn Bowen, Esq., Asst. U.S. Attorney-crim. appeal

Stephen T. Brown, U.S. Magistrate Judge-crim. case

Edward B. Davis, U.S. Distr. Court Judge-temp. trial judge

Thomas Dawson, Esq., counsel-crim. case

Ramon Lopez, Appellant/Movant

A. Scott Miller, Esq., trial counsel

Susan Ponzoli, Esq., Assistant U.S. Attorney

Karen E. Rochlin, Esq., Prosecutor, Assistant U.S. Attorney

Norman C. Roettger, U.S. District Judge-orig. assigned trial judge

Robert A. Rosenblatt, Esq., Lopez' crim. trial counsel

Anne R. Schultz, Esq., Asst. U.S. Attorney/Chief-Appellate Div.

Madeline R. Shirley, Esq., Asst. U.S. Attorney-Crim. Appeal

Charlene H. Sorrentino, U.S. Magistrate Judge

_____

Rhonda A. Anderson, Esq.

APPLICATION FOR CERTIFICATE OF APPEALABILITY

THE APPELLANT, RAMON LOPEZ, by and through undersigned counsel, moves this Court to grant him an certificate of appealability of the following issues raised in the trial court below:

I. Whether the District Court erred in denying Ramon Lopez' motion for leave to file motion for reconsideration of Order Adopting Report and Recommendations of Magistrate Judge and request to supplement with issues based upon ***Apprendi v. New Jersey,***[1] where the Appellant received a life sentence and neither the Indictment, jury instructions, or the verdict presented the issue of the quantity of drugs for the jury's consideration?

II. Whether the District Court erred in denying Ramon Lopez' motions for discovery, to depose an essential witness, and requests to stay proceedings during pendency of Freedom of Information Act requests for evidence and information relevant to his motion for post conviction relief in the instant case?

III. Whether the District Court erred in adopting the findings of fact and conclusions of law of a magistrate judge in a related case where such rulings were based a Report and Recommendation that the district court had not yet affirmed?

IV. Whether The District Court Abused Its Discretion In Denying Ramon Lopez's Motion to Vacate, Reduce or Set Aside Sentence pursuant to 28 U.S.C. § 2255?

V. Whether The District Court Abused Its Discretion In Denying Ramon Lopez' Request For An Evidentiary Hearing Where the Facts Alleged, If Proved, Supported A Showing Of A Denial Of Lopez' Sixth Amendment Constitutional Right to Effective Assistance of Counsel?

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[1] 530 U.S. ___, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

STATEMENT OF FACTS

A. Course and Disposition of Proceedings:

On April 24, 1997, *Ramon Lopez* together with five co-defendants, were indicted for conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §846 in Count I, and possession with intent to distribute cocaine in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 in Count II. The Indictment did not specify that any specific quantity of cocaine, nor did the Government request jury instructions or verdict forms that required the jury to determine that element of the offenses charged. (91CR317-DE 1).

After a modified Allen charge was administered on the third day of deliberations, the jury convicted *Lopez* on both counts, but acquitted his codefendants, Nacy Garcia and Orosco-Zapata[2] (91CR317-DE 232,233,235).

During trial, over the Lopez' objection, the Government introduced evidence of *Lopez'* prior conviction (91CR317-R6-683-88; R7-712-27, 737,740,750,823; R10-1226). The trial court also denied *Lopez'* motion to strike the Government's evidence submitted pursuant to Fed. R. Evid. 404(b)(2) due to the Government failure to prove *Lopez'* involvement in the prior case. (91CR317-R10-1088-89). Thereafter, *Lopez* unsuccessfully sought admission of a certified copy of his notice of the prior conviction the Government had introduced. (91CR317-R10-1083-89).

The trial court sentenced *Lopez* to concurrent terms of life imprisonment, to be followed by five years supervised release. Further, pursuant to the Government's notice of intent to seek sentencing enhancement under 18 U.S.C. §3147, the trial court sentenced *Lopez* to a consecutive six month term of incarceration. (91CR317-DE-1,265). *Lopez* is presently incarcerated serving the sentence imposed in this cause.

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[2] Three of the originally charged codefendants, Gerardo Machado, Redelio Garcia and Luz Mary Del Pino, plead guilty. (91CR317-DE 192). However, at trial, two of the three who plead guilty testified for *Lopez* and one testified for the Government. (91CR317-R5-396, R10-1089-90,1173).

On April 29, 1997, *Lopez* filed a *pro se* motion to vacate, reduce or set aside his sentence pursuant to 28 U.S.C. § 2255 (hereinafter "2255 motion"), raising the following grounds:

(1) The trial court abused its discretion in admitting evidence of *Lopez'* prior conviction under appeal where, over the defendant's objection, the nature of the prior offense was published to the jury;

(2) *Lopez* was denied effective assistance of trial counsel;[3]

(3) The Government engaged in prosecutorial misconduct and violation of *Brady* by providing *Lopez* with erroneous *Jencks* materials, erroneously denying that the Government and informant targeted *Lopez*, and knowingly allowing the Government's key witness to lie at trial; and

(4) Evidence obtained in violation of the U.S. Constitution and U.S. Treaties was used to obtain *Lopez'* indictment and conviction. (DE-1).

Thereafter, on July 20, 1998, *Lopez* filed a motion for leave to invoke discovery and/or expand the record pursuant to Rules 6 and 7 of the Rules governing 2255 proceedings in order to obtain and introduce evidence of his first trial counsel's conflict of interest and ineffectiveness in failing to advise Lopez that the government provided him a written plea agreement after Lopez was debriefed. (91CR317-DE-345,346,350,351).

Without ruling on *Lopez'* motion for leave to invoke discovery and/or expand the record, on December 18, 1998, the Magistrate Judge entered a Report and Recommendation denying *Lopez'* 2255 Motion, (DE-3), and *Lopez* filed a motion for reconsideration of said Report and Recommendation. (91CR317-DE-356).

The District Court then entered an Omnibus Order granting, in part, *Lopez'* motion for reconsideration, but denying his motions for leave to invoke discovery and/or expand record, and to stay pending ruling on disclosure of discovery in related matter. (91CR317-DE-358). The order remanded *Lopez'* ineffective

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[3] Referred to in the Record as Claim V of Lopez' 2255 Motion.

assistance of counsel claim[4] back to the Magistrate Judge for further consideration. *Id.*

On June 22, 1999, the Magistrate Judge entered an order directing *Lopez* to provide a written Status Report. (91CR317-DE-359). *Lopez* then filed a Status Report together with a Supplement to his 2255 Motion, with supplemental objections to the first Report and Recommendation. (91CR317-DE-361-62, 365,369).

On June 21, 2000, the Magistrate Judge entered a Supplemental Report and Recommendation denying Claim V of Lopez' 2255 Motion without an evidentiary hearing, to which Lopez filed written objections. (91CR317-DE-380,384,387). The District Court then entered an Order summarily denying the written objections. (91CR317-DE-388). Thereafter, *Lopez* moved for leave[5] to file a motion for reconsideration and further supplement his 2255 Motion with an *Apprendi* claim. Those requests were likewise denied. (91CR317-DE-389-90). Thereafter, this appeal ensued, and the District Court denied Lopez' a Certificate of Appealability. (91CR317-DE-391).

B. <u>Facts Developed in Related 2255 Proceeding Regarding Ineffective Assistance of Counsel</u>:

Magistrate Judge Sorretino's Report and Recommendation in the instant case[6] heavily relied upon the factual findings of a Report and Recommendation of Magistrate Judge Garber[7] which has not been adopted and ratified by the District Court. (*See,*

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[4]Referred to in the Record as Claim V of Lopez' 2255 Motion.

[5]The Clerk had sent the Order to the undersigned's previous address. Therefore, the Order was not received within 10 days of its entry, and leave was accordingly sought.

[6] Southern District of Florida Case Nos. 97-1422-CV-UUB and 91-0317-CR-UUB.

[7]Southern District of Florida Case Nos. 97-1875-CV-EGD and 90-389-CR-EGD.

docket sheets and said Reports attached to instant Application as Ex. "A" through "F," respectively). Before the Sorrentino Report was entered, a separate evidentiary hearing was not conducted. Moreover, the District Court did not adopt or ratify the Garber Report at any time before or anytime thereafter. Further, the factual findings in the Garber Report have been strenuously objected to as either being totally unsupported in the record or clearly erroneous. (*See,* Ex. "A" through "D" to instant Application).

(1) Conflict of Interest - A. Scott Miller, Esq.

At the time that A. Scott Miller represented Lopez during the pre-trial stages of the instant case, Miller, a former Assistant U.S. Attorney, knew and had ample information to conclude that he was under investigation for criminal activities involving major drug traffickers. In addition, during Miller's representation of Lopez, he received a proposed written cooperation plea agreement from Assistant U.S. Attorney Karen Rochlin, but never advised Lopez verbally or in writing that any proposed written plea agreement was received.

Investigation, Prosecution, and Cooperation of Miller

From as early as October 1989 through November 1991, the Government commenced an investigation into Lopez' former counsel, Scott Miller. As part of the investigation, Assistant United States Attorney Paul Pelletier subpoenaed William Wood to testify before a grand jury on December 6, 1991. *See, grand jury transcript, Ex. "D"*[8] *to Lopez' Reply to Govt's Response to Supp. to 2255 Motion* (91CR317-DE-369). During his grand jury appearance, Mr. Wood acknowledged that he had been cooperating with the Government "for over 4 years." *Id,* at p. 5. Mr. Wood further explained that he had used Scott Miller, Esq. to complete transfers real estate purchased with drug funds to "innocent third parties," who were strawmen that Wood used. *Id.*

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[8]Although undersigned counsel did not oppose the Government's motion to seal said transcript, no Order appears in the record granting same. *See*, motion to strike and Lopez' Response at 91CR317-DE-371,372. The docket, however, incorrectly refers to Lopez' response as a "Response by USA." *Id.* at DE-372.

at pp. 10-13,15-19, 24-25, 27. Further, Mr. Wood began testifying for the Government as early as April 17, 1990 – wherein Scott Miller cross-examined Mr. Wood during the trial of Mauricio Ochoa. *Id. at Ex. "E" & Ex. "D," at p. 27.*

Additionally, then U.S. Customs Special Agent Ronald Ingelby commenced the investigation of Scott Miller as early as October, 1989 and ceased his participation in the investigation in November 1991 when he left Customs. *See, Id., at Ex. "C" - Affidavit of Chris Burns.*

Moreover, the type of interrogation the Government engaged in during their September, 1991 deposition of Scott Miller would have removed all doubt from the former prosecutor's mind that he was a target of a federal investigation. In that deposition, the Government specifically referred to the strawmen transactions that Miller committed on behalf of Mauricio Ochoa and William Wood. *See, Id. at Ex. "F."*[9] Further, around the time of the deposition, Agent Ingleby and Scott Miller had a brief conversation at the Metropolitan Correctional Center in Miami in which Miller intimated to Ingleby, "Ron, I have small children."[10] Thereafter, an Information charging Miller with making a false statement was filed. *See, Id. Ex. "F" and "G."* In a letter to his sentencing judge, Miller clearly acknowledged that during this deposition, he knew he was a target of a criminal investigation:

> Thus, there was no reason to avoid a truthful answer, [during the deposition] ***other than my own fear and panic over the very real threat to my career and freedom because I was a target of the government's investigation.*** . . .

Id., at Ex. "G" at p. 14. (emphasis added). Although Miller was given ample opportunity to present evidence at his sentencing

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[9] Deposition of Scott Miller taken Sept. 10, 1991, in *U.S. v. One Parcel of Real Estate at 106 Pt. Pleasant Dr., Key Largo, etc.*, So. Distr. Fla., Case No. 90-10058-Civ-King.

[10]This statement is contained in an Affidavit filed in the Garber case, Case No. 97CV1875/90CR389-DE-392-3.

hearing to show that a legitimate attorney-client relationship existed between him and Ochoa, Miller declined. *See, Id., at Ex. "H."*

Evidence of Miller's fear and panic of being a target is further bolstered by the accusatory nature of the Government's questioning during his deposition, and his reactions thereafter to Ingleby and the government. (*Id., Ex. "F").* -At the time the deposition was taken, Miller was actively representing Lopez. Further, at the time Miller's deposition was taken, all the potential claimants to the forfeiture proceeding had consented to forfeiture, except the straw man for Miller's former client, Ochoa. Approximately five weeks after Miller's deposition, the straw man, Jaime Moore, mailed a consent to default judgment to the Clerk from Colombia, S.A. *See, Id., Comp. Ex. "J," - copy of file from forfeiture case.*[11]

After Scott Miller exhausted all his appeals before this Court, Miller began cooperating with the United States Attorney's Office by testifying as a Government witness in the evidentiary hearings regarding Lopez' 2255 Motion pending before Magistrate Judge Garber.

(2) Plea Offer/Negotiations & Failure to Communicate to Lopez that that Government Faxed a Written Plea Agreement:

During his representation of the *Ramon Lopez,* Scott Miller received a Rule 11(e)(6) letter for the first debriefing of *Lopez* with the D.E.A. on June 18, 1991, and a fax of proposed Plea Agreement -- twenty-eight (28) days after the first debriefing.[12] *See,* Comp. Ex. "A" to Lopez' Supp. to 2255 Motion and Supplemental Objections to Report and Recommendation. (91CR317-DE-361-Ex. "A"). Nonetheless, during the earlier stages of the proceedings before Magistrate Judge Garber, District

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[11] In this file, Moore's Consent to Default is at DE-39.

[12]Ramon Lopez was debriefed a second time on or about July 28, 1991, by Agents of the United States Customs Service.

Judge Davis noted that Assistant U.S. Attorney Karen Rochlin boldly claimed that defense counsel could never prove that a plea offer ever existed.[13] However, the Movant fortuitously obtained a copy of a proposed plea agreement in a portion of the files of Scott Miller had on *Lopez.*

The first debriefing and the Plea Agreement were the result of Miller's efforts to resolve Lopez' cases through negotiation, which is memorialized in correspondence between counsel. See, *Letters between Assistant U.S. Attorney Karen Rochlin and Scott Miller, dated May 23, 1991, May 30, 1991, and June 18, 1991 [Rule 11 Proffer], and proposed Plea Agreement faxed to defense counsel on July 26, 1991.* (91CR317-DE-369-Ex. "K").

Scott Miller, however, never communicated the existence of the Plea Agreement to *Ramon Lopez,* (*See,* Movant's *Pro Se* 2255 Motion, 91CR317-DE-318), and such is ineffective assistance even where counsel has no conflict of interest.[14] *See,* Order Judge Davis entered on dated April 20, 1999, included in Comp. Ex. "A" to Supp. 2255 Motion. *Id.*

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[13] U.S. District Court Judge Davis noted in his April 20, 1999 Order:

> The Court notes that the transcripts reflect that the fact that at the March 12 hearing the Government, through "clever" testimony, suggested without lying that no plea offer was ever extended to Petitioner. *See, note 4,* of Exhibit A-1.

[14] ***Johnson v. Duckworth,*** 793 F.2d 898, 902 (7th Cir.), cert. denied, 479 U.S. (1986)(client must be involved in decision to accept or reject plea offer, and failure to inform client of offer constitutes ineffective assistance); ***United States v. Zelinsky,*** 689 F.2d 435 (3rd Cir. 1982)(same); ***Arredondo v. United States,*** - F.3d - , 1999 WL 335712, (6th Cir., May 28, 1999, Case Nos. 96-2126, 96-2583)(district court erred in failing to conduct evidentiary hearing based upon failure of lawyer to challenge quantity of drugs attributable to Movant and failure to communicate plea offer to Movant); ***Diaz v. United States,*** **930 F.2d 832, 834 (11th Cir. 1991)**(counsel has an obligation to consult with his client on important decisions and to keep him informed of important developments in the course of the prosecution); ***United States v. Blaylock,*** 20 F.3d 1458, 1466-67 (9th Cir. 1994)(where counsel failed to advise defendant of plea offer, district court erred in failing to conduct an evidentiary hearing). See also, ***United States v. Riascos,*** 164 F.3d 632 (9th Cir. 1998)(same).

Government's Negative Attitude Toward a Cooperation Plea Developed Later

The findings in the Magistrates' respective Reports that based upon that the Government was not interested in any cooperation from Lopez, are wholly without support in the record. The Magistrates' Reports based this lack of interest on a June 1992 letter from the Government. However, the Plea Agreement was negotiated and drafted during the summer of 1991; not 1992. More specifically, the relevant and critical periods in which Scott Miller represented Ramon Lopez and Mr. Lopez actively sought a plea agreement from ***May, 1991 through August, 1991.*** Thus, Magistrate Judges respective reliance on the Government's ***June 25, 1992 letter*** indicating that *one year later*, the Government was not interested in extending a cooperation plea to Mr. Lopez, is irrelevant. (Supp. Report at 2). Thus, the conflict and prejudice that flowed therefrom occurred when the Government extended a plea offer to Mr. Lopez in 1991; not 1992.

Further, the Record amply shows that in 1991, the Government debriefed Lopez, and *after* the debriefings, faxed the draft of a cooperation plea agreement to Scott Miller. The Government never accompanied the faxed agreement with any correspondence to indicate that the proposed Plea Agreement was not a plea offer, was merely a form faxed to Scott Miller to get him to stop calling the Assistant U.S. Attorney, Karen Rochlin, or that Scott Miller should advise *Mr. Lopez* that the Plea Agreement could not be construed as an actual offer, because the Government had developed a "negative attitude" toward Mr. Lopez. Moreover, Ms. Rochlin's testimony that during the debriefings that Ramon Lopez engaged in "emotional outbursts," is clearly and unequivocally contradicted by Scott Miller's testimony that *Ramon Lopez* did not engage in any such emotional outbursts. Rather, Miller described the atmosphere during the debriefings as ***"cordial."*** *See, Id.*, at Ex. "C," p. 17. Further, even assuming that any emotional breakdown occurred that would have rendered *Mr. Lopez* a witness who would not have withstood cross-examination, *Lopez'* cooperation was not tied to his testifying at trial for the Government. Rather, his cooperation only concerned

his providing "substantial assistance," -- which can take many forms.

Thus, the conclusion that the Government developed a *negative attitude toward* Ramon Lopez *during the debriefings, is not supported in the Record and further defies all common sense and reason.* See also, Id., *Ex. "B," pp. 5-6.*

District Court Erroneously Concluded Lopez Was Shown Written Plea Agreement

The District Court and Magistrate Judge erroneously concluded from commentary during the sentencing proceedings in the Garber/Davis case that "'there is no[t] question in this case that Mr. Lopez, myself [Miller], AUSA Rochlin, and the agents have **discussed plea negotiations.'"** *Supp. Report at 3. However, such references to "plea discussions" during a sentencing hearing in January of 1992, does not establish that Ramon Lopez was ever shown a copy of the final Plea Agreement the Government offered.*

Further, Scott Miller never testified that he recalls providing a copy of the faxed Plea Agreement to Ramon Lopez. *Rather, the lack of correspondence to support any communication that with the Government that* Ramon Lopez *refused to cooperate and rejected the final Plea Agreement, as was the customary practice for Scott Miller, the Government and the Agents involved -- clearly demonstrates that the Plea Agreement was never shown to* Mr. Lopez. *Specifically, Attorney Miller testified that it was his customary practice, after communicating a plea offer to a client, that if the client rejected the offer he would communicate the client's response back to the United States Attorney's Office or the case agent (June 10, 1999 transcript before Magistrate Garber, at pp. 29-31, attached as Ex. "C" to Appeal to Supp. Report and Recommendation). Similarly, the United States Custom Service possessed no records in their files that Scott Miller advised them that he had met with Ramon* Lopez *and* Lopez *decided not to accept the plea offer (*Id., *Ex. "C" at pp. 33-34). Likewise, Karen Rochlin testified that she had no knowledge as to whether Scott Miller ever showed the Plea Agreement to* Ramon Lopez. See, Id., *Jan. 10, transcript at p. 68).*

Thus, this District Court's reliance upon Scott Miller's "customary practice" of showing all plea agreements to his clients, is clearly erroneous. Further, when the lack of correspondence supporting a showing that the Plea Agreement was shown to *Ramon Lopez*, is coupled with the degree of stress that Scott Miller would have experienced during a criminal investigation of his involvement in money laundering with major traffickers, common sense and reason dictate that neither Miller nor any other human being would necessarily follow their "customary practices."

Lopez Has Adequately Demonstrated that He Would Have Accepted the Offer

Lastly, the District Court's conclusion that *Ramon Lopez* failed to present any evidence that he would have accepted the Government's final Plea Agreement is belied by the Record. During the sentencing hearing in the Garber/Davis case, *Ramon Lopez* clearly stated to the Court: *"I have tried every possible way to reach **an agreement**,* just like my attorney said, with the Government." (Transcript of sentencing at p. 15). That testimony remains unimpeached, and clearly indicates that *Ramon Lopez* never knew an Agreement existed. Further, that testimony shows that if *Ramon Lopez* knew he had an Agreement, he would have accepted it. He tried every possible way, -- but never knew that the Government had provided his counsel a written cooperation plea agreement. Thus, the District Court's conclusion that *Lopez* statement shows that he did not accept an agreement that he thought never existed, is clearly erroneous.

ARGUMENT

THE DISTRICT COURT IMPROVIDENTLY DENIED MOVANT'S CERTIFICATE OF APPEALABILITY WHERE MOVANT MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT OF EFFECTIVE ASSISTANCE OF COUNSEL, AND HIS RIGHT TO A FAIR TRIAL.

This Court has authority to issue a certificate of appealability where a district court has denied the defendant's application for

such, where a Movant makes a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2); ***Edwards v. United States,*** 114 F.3d 1083, 1084 (11th Cir. 1997). *See also,* Fed. R. App. P. 22(b).

To satisfy this requirement, the Movant "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are 'adequate to deserve encouragement to proceed further.' " ***Barefoot v. Estelle,*** 463 U.S. 880, 893 n. 4, 103 S.Ct. 3383, 3394 n. 4, 77 L.Ed.2d 1090 (1983); *See also,* ***Livingston v. Johnson,*** 107 F.3d 297 (5th Cir. 1997).

As demonstrated in the Statement of Facts above, the record shows that *Ramon Lopez* made a substantial showing of the denial of substantial constitutional right: effective assistance of counsel, and denial of his right to a fair trial. Moreover, the record shows that *Lopez* was improvidently denied the opportunity to supplement his motion with materials sought through the Freedom of Information Act that the Government and the District Court refused to provide him leave to discover, and further denied the opportunity to supplement his 2255 Motion with a clearly warranted *Apprendi* claim. Additionally, the failure of the District Court to afford Lopez any discovery whatsoever in the 2255 proceedings, delay and hampered his ability to present additional evidence supporting his claims. Moreover, the District Court improperly relied upon factual findings of Magistrate Judge Garber which are clearly erroneous, wholly unsupported in the record, and not ratified or adopted by the District Court.

Lastly, the District Court's denial of the admission of Lopez' prior conviction in violation of the Supreme Court's subsequent decision in ***Old Chief v. United States,*** 117 S.Ct. 644 (1997).

Supplementation of 2255 Motion

Lopez sought to supplement his 2255 Motion with both additional facts and evidence to support his already existing claim of ineffective assistance of counsel, and submit a claim under the Supreme Court's decision in *Apprendi,* which was decided long after Lopez filed his *pro se* 2255 Motion. As explained in this Court's decision in ***Davenport v. United States,*** 217 F.3d 1341

(11th Cir. 2000), *pet. cert filed* Oct. 11,. 2000, No. 00-6561), Fed.R.Civ.P. 15 allows a party to amend or supplement a pleading. Further, Rule 15(c)(2) provides that "[a]n amendment of a pleading relates back to the date of the original pleading when ... the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." *Id.*

Further, the District Court's order failed to set forth reasons for the denying Lopez' request to supplement or his requests[15] to stay proceedings pending the conclusion of his multiple FOIA requests. ***United States v. Thomas,*** 221 F.3d 430 (3rd Cir. 2000)(district court abuses discretion when it denies leave to supplement without stating any justifying reason). Accordingly, the District Court's legal conclusion that it lacked authority to allow an amendment, is an issue of law and thus, is considered by this court de novo. *Id.*, at 1344, *See e.g.* ***Dang v. UNUM Life Ins. Co.,*** 175 F.3d 1186, 1189 (10th Cir.1999); ***Thomas,*** 221 F.3d, 433-34.

In ***Thomas,*** the Third Circuit considered the appeal of a defendant from the denial of his timely § 2255 motion in which he stated twenty-four grounds for relief. *See* 221 F.3d at 431-33. He subsequently filed a motion for permission to file a memorandum of law in support of his claims. The district court denied him permission to file the memorandum because it would be filed after the expiration of § 2255's one-year limitation period. It then denied his original motion because he failed to state a cause of action. On appeal, the Third Circuit held that, "under Fed.R.Civ.P. 15(c), a District Court may, in its discretion, permit an amendment which clarifies or amplifies a claim or theory in a timely filed § 2255 petition after the AEDPA's one-year period of limitations has expired." ***Thomas,*** 221 F.3d at 438. In remanding to allow the district court to reconsider the defendant's request to amend, the appellate court concluded that Rule 15(c) applies to

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[15]Said requests were done in his objections to the Supplemental Report and Recommendation.

allow amendment to § 2255 motions "as long as the petition itself was timely filed and the petitioner does not seek to add an entirely new claim or new theory of relief." *Id.* at 436; *see also* ***United States v. Duffus,*** 174 F.3d 333, 337 (3d Cir.) (stating in dictum that untimely amendment allowed "to clarify a claim initially made"), *cert. denied,* 528 U.S. 866, 120 S.Ct. 163, 145 L.Ed.2d 138 (1999).

Accordingly, the District Court abused its discretion in denying Lopez leave to supplement his already existing claims, and to supplement his *pro se* argument regarding the insufficiency of the Indictment set forth in his original 2255 Motion with the Supreme Court's ruling in ***Apprendi.*** Lopez received a life sentence, plus a consecutive six month term, and the Indictment did not charge him with any specific quantity of cocaine. Further, the neither the jury instructions nor the verdict required the jury to find that *Lopez* was responsible beyond a reasonable doubt for at least 5 kilograms of cocaine. Accordingly, the District Court erred in failing to allow *Lopez* to supplement his *pro se* 2255 Motion.

Denial of Discovery

In order to establish entitlement to discovery in a habeas proceeding, a movant must identify the essential elements of his claim, and that good cause exists for discovery to be granted. ***Bracy v. Gramley,*** - U.S. -, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). In determining whether the movant has made a showing of the essential elements of a claim, this Court may not weigh the evidence or deny discovery even if a theory alleged is speculative. ***See, Bracy,*** 117 S.Ct. at 1797 (difficulties of proof or speculative nature of theory is not sufficient to deny discovery, where such allegations, if proved, would show a violation of the Movant's right to a fair trial).

Lopez made specific requests for discovery that would show that Scott Miller was under investigation, knew that he was under investigation, failed to communicate to him that a written plea agreement had been sent, and that the Government was interested in his cooperation. Nevertheless, without stating reasons for such, the District Court summarily denied discovery even though the

matters requested went to the heart of Lopez' claims - denial of effective assistance of counsel. Accordingly, this denial demonstrates that it effected is ability to show denial of a constitutional right, and a certificate of appealability should issue.

Issues Concerning Effective Assistance of Counsel Claims

Additionally, the District Court's adoption of the Magistrate Judge Garber's findings of fact are clearly premature where they were subject to strenuous objections based upon lack of evidentiary support in the record. Moreover, the Order was additionally premature due to the pending FOIA requests for material evidence.

Assuming arguendo, that the District Court's Order was not premature, it clearly was based upon a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2); ***Edwards v. United States,*** 114 F.3d 1083, 1084 (11th Cir. 1997). Here, the claims were based on the failure of counsel with an actual conflict of interest, to communicate that a written plea agreement existed and was offered.

In ***Diaz v. United States,*** 930 F.2d 832 (11th Cir.1991), this Circuit recognized that where an attorney fails to consult with a client regarding a plea offer or other important decisions, such failure rises to the level of ineffective assistance of counsel. ***Diaz*** at 834-35. Specifically, the Court stated:

> Counsel has an obligation to consult with his client on important decisions and to keep him informed of important developments in the course of the prosecution. *Strickland v. Washington,* 466 U.S. 668, 688, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); see also *Johnson v. Duckworth,* 793 F.2d 898, 902 (7th Cir.), cert. denied, 479 U.S. 937, 107 S.Ct. 416, 93 L.Ed.2d 367 (1986) (client must be involved in decision to accept or reject plea offer, and failure to inform client of offer constitutes ineffective assistance). To succeed on a claim of ineffective assistance of counsel, petitioner must show that his counsel's performance was so deficient as to deny him his

> guaranteed right to counsel and that the deficient performance prejudiced his defense. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. Prejudice is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. at 2068.
>
> Although counsel's advice to Diaz that the plea offer was "bullshit" does not alone suggest that Diaz was "involved" in the decision to reject the plea offer, it does indicate that counsel informed Diaz of the offer. Similarly, although Diaz denies that he and his counsel reached a decision to reject the offer, he obviously was aware of its rejection. The magistrate noted in his report, and the record supports the conclusion, that Diaz acknowledged that "counsel discussed the merits of the Government's offer with him and a decision was made to reject the offer. . . . "

Diaz, 930 F.3d at 834.

In the instant case, the Record shows that Scott Miller never communicated the Government's plea offer to Ramon Lopez, and that Lopez would have accepted a cooperation plea agreement. As he stated at his sentencing in the Garber/Davis case, "[i]n front of you, I say it again – I have the greatest disposition to cooperate with the Government." (Sentencing Transcript at p. 16). Thus, the result of the *Lopez'* sentencing would have been different, and at the very least, he would have received a reduction in his base offense level for acceptance of responsibility and a reduction for cooperation, which due to his attorneys' failure to communicate, was thwarted.

Therefore, the appropriate remedy in the instant case it to reinstate the original plea offer, thereby placing *Lopez* in the position he would have been in had the Sixth Amendment violation not occurred. In ***United States v. Blaylock,*** 10 F.3d 1458, 1468 (9th Cir. 1994), the Ninth Circuit observed:

> Since the remedy for counsel's ineffective

> assistance should put the Defendant b ack in the position he would have been if the sixth Amendment violation had not occurred, in certain circumstances, granting a new trial may not be the appropriate remedy. Several courts have recognized that where the ineffective assistance occurred before trial as in cases where the harm consisted in defense counsel's failure "to communicate a plea offer to the defendant . . . [granting a] subsequent fair trial does not remedy this deprivation . . . .

Blaylock, 20 F.3d at 1468. (citations omitted). *See also,* ***Mabry v. Johnson,*** 467 U.S. 504, n. 11 (1984) and ***United States v. Morrison,*** 449 U.S. 361,364 (1981).

As a result, Lopez clearly demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2); ***Edwards v. United States,*** 114 F.3d 1083, 1084 (11th Cir. 1997). *See also,* Fed. R. App. P. 22(b). *Lopez* satisfied this requirement by demonstrating "that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are 'adequate to deserve encouragement to proceed further.' " ***Barefoot v. Estelle,*** 463 U.S. 880, 893 n. 4, 103 S.Ct. 3383, 3394 n. 4, 77 L.Ed.2d 1090 (1983); *See also,* ***Livingston v. Johnson,*** 107 F.3d 297 (5th Cir. 1997). Thus, a Certificate of Appealabilty should issue as to all of the requested issues regarding the ineffectiveness of counsel and the District Court's rulings thereon.

OldChief - Evidence of Prior Conviction

Additionally, in *Lopez'* original *pro se* 2255 Motion, he raised the District Court's failure to grant his objection to the admission of his prior conviction (which was on appeal), the substance of that conviction, and the denial of his request to submit a certified copy of the Notice of Appeal before the jury. In ***Old Chief v. United States,*** 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), the Supreme Court held, *inter alia,* that the district court abused its discretion when it refused defendant's offer to admit to evidence of prior conviction element of offense and instead

admits full record of prior judgment of conviction when name or nature of prior offense raises risk of verdict. Additionally, the Court held that evidence of name and nature of defendant's conviction was not admissible to show prior felony conviction element of offense of possession.

Inasmuch as the jury acquitted *Lopez'* co-defendants who were allegedly involved in the conspiracy and offense charged, and on the third day of deliberations, the jury was given a modified Allen charge, the impact of the prior conviction caused *Lopez* significant prejudice. Further, evidence of a prior conviction is generally recognized to have the potential for prejudice even if a defendant's stipulation kpet the name and details of the previous offense from the jury. *See,* ***Spencer v. Texas,*** 385 U.S. 554, 560 (1967), ***United States v. Hardin,*** 139 F.3d 813, 185 (11th Cir. 1998).

Here, Lopez both objected to the admission of the evidence, and offered to ameliorate the prejudicial impact by admitting a certified copy of his notice of appeal. The District Court, however, refused both requests. Further the lengthy deliberations and acquittal of others alleged to be intimately involved clearly demonstrated that the admission of the additional evidence of a prior conviction prejudiced Lopez' constitutional right to a fair trial. Hence, Lopez demonstrated a substantial showing of the denial of his constitutional right to a fair trial, and a certificate of appealability should issue.

CONCLUSION

Based on the foregoing reasons and authorities, the Appellant, *Ramon Lopez,* respectfully requests that a certificate of appealability issue for the issues set forth herein.

Respectfully submitted,
RHONDA A. ANDERSON, P.A.
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Telephone: (305) 444-1400
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed this 2ND day of March, 2001, to the ***Office of the United States Attorney, Appellate Division,*** Attn: Anne R. Schultz, Esq., 99 Northeast Fourth Street, Miami, Florida 33130.

_____

RHONDA A. ANDERSON, ESQ.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 00-16074-F

RAMON LOPEZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

August 17, 2001

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant failed to make a substantial showing of the denial of a constitutional right. See U.S.C. § 2253(c)(2).

J.L. EDMONDSON
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 00-16074-F

District Court Case Nos. 97-01422-CV-UUB
and No. 91-00317-CR-UUB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

RAMON LOPEZ,
Defenant/Appellant.

_____/

MOTION FOR RECONSIDERATION OF ORDER DENYING CERTIFICATE OF APPEALABHLITY

The Appellant, RAMON LOPEZ, by and through his undersigned counsel, respectfully moves this Court to reconsider its Order denying a Certificate of Appealability on the five (5) issues set forth in his Application. In support thereof, the Appellant would state:

A. *LENITY IS REQUIRED WHERE A SEVERE SENTENCE WAS IMPOSED UPON THE APPELLANT SEEKING A CERTIFICATE OF APPEALABILITY:*

This Court overlooked the lenity required where reviewing a habeas petitioner's request for a certificate of appealability (hereinafter "COA") where the petitioner is serving a severe penalty, such as the life sentence imposed against *Mr. Lopez* herein. (91Cr317-DE-1, 265). *See, **Moore v. Johnson,*** 215 F.3d 495 (5th Cir. 2000)(opined that uncertainty about the propriety of granting a COA would be resolved in habeas petitioner's favor, and the severity of his prescribed penalty of death would color the Court of Appeals' consideration of whether he had met his burden of making a substantial showing of denial of a constitutional right).

In the instant case, the Appellant raised five independent and separate basis for the granting of a COA, each of which presented issues debatable among jurists, and/or issues upon which a conflict exists among the various Circuit Courts. The crux of each of the issues presented in his COA is separately highlighted below:

B. *APPRENDI*[16] *APPLIES RETROACTIVELY:*

The Fifth Circuit recently reversed and remanded for further consideration as to the issue of retroactivity a request for COA on a Section 2255 motion in ***United States v. Clark,*** – F.3d –, 2001 WL 845193 (5th Cir., July 26, 2001). *See,* copy attached hereto at ***Appendix "A."*** Like the instant case, the appellant in ***Clark*** moved the trial court to amend his Section 2255 motion to raise *Apprendi* type issues. However, rather than denying Clark's certificate of appealability, two of the Fifth Circuit Judges ruled that the matter should be remanded for the district court to "reconsider it ruling denying Patrick Clark an amendment to his § 2255 motion based on futility in light of *Apprendi.*" *Id.,* Slip Opinion at p. 1.

In addition, Circuit Judge Parker in his thoroughly reasoned dissent, opined that the district court erred in ruling that Clark's motion to amend his initial § 2255 petition be denied based upon futility, and further opined that ***Apprendi*** announces a new substantive rule, and that ***Teague's***[17] prohibition against retroactivity does not apply. Hence, Judge Parker stated that the matter should not be remanded for further consideration, because the court could directly address the underlying claims without further delay.

In ***Clark,*** Judge Parker first examined the reasoning upon which the Fifth Circuit and/or the Supreme Court ruled that ***Richardson v. United States,*** 526 U.S. 813, 199 S.Ct. 1707, 143 L.Ed.2d 985 (1999) and ***Bailey v. United States,*** 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), applied retroactively.

With regard to ***Richardson,*** Judge Parker noted that in ***United States v. Lopez,*** 248 F.3d 427 (5th Cir. 2001), the Fifth Circuit held that ***Richardson*** was a "new rule," ***Lopez,*** 248 F.3d at 431, and that it was retroactively applicable on collateral review. *Id.* at 432. *See, **Clark,*** Slip Op. at 3. Similarly, the Fifth Circuit reasoned that the "decision in ***Bailey*** articulates the substantive elements that the government must prove to convict a person charged with using a firearm under § 924(c)(a). It explains what conduct is, and has always been, criminalized by the statute." ***United States v. McPhail,*** 112 F.3d 197, 199 (5th Cir. 1997).[18] Judge Parker noted that the Supreme Court subsequently adopted

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[1]530 U.S. ___, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

[2]***Teague v. Lane,*** 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

[3]Cited by Circuit Judge Parker in ***Clark*** at p. 4, Slip Opinion.

the same reasoning and conclusion in ***Bousley v. United States,*** 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) when it held that ***Bailey*** retroactively applied.

After noting that the Fifth Circuit (like the this Court)[19] has held that ***Apprendi*** defines the elements of drug offenses, Circuit Judge Parker examined the language of ***Apprendi*** and other courts that held that ***Apprendi*** is not retroactive, and opined that their logic was unpersuasive. He reached this conclusion based upon the prior precedent retroactively applying ***Richardson*** and ***Bailey***, and the risk that a person may be subjected to the maximum term of ten year to life imprisonment while being "actually innocent" of a sentencing enhancement. Circuit Judge Parker explained his reasoning as follows:

> ***Bousley 's*** holding turns on the idea of actual innocence and concerns itself with the "impermissibly large risk that the innocent will be convicted." *See* ***Bousley,*** 523 U.S. at 620, 118 S.Ct. 1604. An ***Apprendi*** claim in the context of § 841, in its simplest terms, asserts that while a defendant is guilty of possessing an unspecified quantity of a controlled substance, he is actually innocent of possessing the quantity necessary to be found guilty and sentenced under the more onerous provisions of 21 U.S.C. § 841(b). *See, e.g.,* § 841(b)(1)(A)(a maximum penalty of life imprisonment and a mandatory minimum of ten years' imprisonment); *see also* ***United States v. Pittman,*** 120 F.Supp.2d 1263, 1270 n. 9 (D.Or.2000)("[A] defendant may be 'actually innocent' of a sentencing enhancement while guilty of the underlying offense.").

Id., Slip Opinion at 6.

In the instant case, the Indictment contained no minimum quantity - as is necessary to trigger the enhanced sentencing provisions of § 841(b)(1)(A). Therefore, the enhanced sentence of life imprisonment that the District Court imposed on *Ramon Lopez* may be for a greater offense he is actually innocent of, while being guilty of the underlying offense – an offense for which the charging statute specifies a maximum of 20 years incarceration, while the Sentencing Guidelines themselves would specify a sentence pursuant to Guideline 12. Accordingly, Ramon Lopez' life sentence is illegal as well as unconstitutional. Therefore, *Mr. Lopez'* Petition for a COA presents a

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[4]***See United States v. Rogers,*** 228 F.3d 1318, 1320-21 (11th Cir.2000).

constitutional issue for which a COA should issue.

C. ***BASED UPON APPRENDI, THE TRIAL COURT LACKED JURISDICTION TO IMPOSE AN ENHANCED SENTENCE:***

Additionally, because neither the Indictment nor the instructions to the jury required the jury to find that *Ramon Lopez* was responsible for the quantity of drugs found at sentencing, a necessary element of Section 841(a) was not charged or proven. ***Jones v. United States,*** 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999),[20] and the failure to do so completely deprived the District Court herein of jurisdiction to impose any sentence. *See, e.g.,* ***United States v. Longoria,*** - F.3d -, 2001 WL 8815609 (5th Cir., July 19, 2001)(failure of indictment to charge a drug quantity and specific reference in the indictment to 21 U.S.C. 841(b)(1)(D) deprived the district court of jurisdiction to sentence defendant to more than 5 years incarceration). Furthermore, where an indictment does not allege a drug quantity, the evidence adduced at trial supporting the trial court's finding of drug quantity is not relevant. ***United States v. Gonzalez,*** - F.3d -, 2001 W.L. 815606 (5th Cir., July 19, 2001). *See,* ***Longoria*** and ***Gonzalez,*** attached hereto as ***Appendices "B"*** and ***"C,"*** respectively. Inasmuch as *Ramon Lopez* was not charged with any penalty provision in Section 841(b), the District Court below was likewise without jurisdiction to impose an enhanced penalty. Therefore, Petition for a COA presents a constitutional issue for which a

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[5]The federal carjacking statute examined in ***Jones,*** set forth a choice of three maximum penalties, two of which were dependent on proof of facts that did not need to be present in the indictment or decided by the jury. 526 U.S. at 229, 119 S.Ct. 1215. The basic statute provided a fine or imprisonment of not more than 15 years for the offense of carjacking, 18 U.S.C. § 2119(1), but if serious bodily injury resulted, the maximum time in prison was 25 years, § 2119(2), and if death resulted, the maximum was life imprisonment, § 2119(3).

Similarly, in the instant case, Title 21 U.S.C. § 841, requires a factual finding to determine if the violation of the applicable statute set forth in subsection (a) involved 5 kilograms or more of cocaine under subsection (b)(1)(A), or over 500 grams but less than 5 kilograms of cocaine under subsection (b)(1)(B).

Furthermore, like the indictment in Jones's case, which made no reference to the subsections of the statute, nor did it charge either that the defendant had inflicted serious bodily injury on the victim or death, the indictment herein wholly fails to identify the penalty provisions imposed after trial. *Lopez'* Indictment not only failed to identify which portion of charged offenses the government sought to impose, it failed to cite to the penalty provisions thereof altogether, and further failed to state any specific quantity of cocaine charged.

COA should issue.

D. *BASED UPON APPRENDI, 21 U.S.C. §§ 841(b)(1)(A) and 841(b)(1)(B) ARE UNCONSTITUTIONAL:*

Moreover, both Sections 841(b)(1)(A) and (b)(1)(B) were recently held unconstitutional based upon their allowing the district court to sentence an individual based upon a "preponderance of the evidence," rather than by a "beyond a reasonable doubt" standard. *See,* ***United States v. Buckland,*** - F.3d -, 2001 WL 893440, Slip Op. at 6 (9th Cir., Aug. 9, 2001) - attached hereto as ***Appendix "D."*** Inasmuch as *Ramon Lopez* was sentenced pursuant to said sections, his sentence is unconstitutional, and a COA should be granted.

E. *CONCLUSION:*

Based upon the foregoing arguments and authority, this Court should grant the Appellant a COA or remand this matter to the District Court for further consideration in light of ***Clark, Longoria, Gonzalez*** and ***Buckland.***

Additionally, inasmuch as the "factual findings" of the District Court were based upon the factual findings of a Magistrate Judge in another matter – that were not final, and for which objections were filed, – the Court should grant the COA to enter an Order either;

(a) requiring the Magistrate Judge in this matter to conduct an evidentiary hearing, or,

(b) requiring the Magistrate Judge to reconsider her "factual findings" from a final order from the related case.

Further, based upon the District Court's failure to allow *Mr. Lopez* to conduct any discovery, or to stay the proceedings to allow *Mr. Lopez* an opportunity to present information properly requested pursuant to the Freedom of Information Act, this Court should remand this matter to permit *Mr. Lopez* to conduct the discovery requested, and direct the District Court to grant the stay requested.

Lastly, Mr. Lopez's petition for a COA presented a clear violation of his constitutional right to a fair trial pursuant to ***Old Chief v. United States,*** 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). Accordingly, a COA should additionally be granted as to this issue.

WHEREFORE, the Appellant, RAMON LOPEZ, through undersigned counsel, respectfully moves this Court to reconsider it denial of a Certificate of Appealability.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed (U.S. mail) this 27th day of August, 2001, to: ***Susan Ponzoli, Assistant United States Attorney,*** Appellate

Division, 99 Northeast Fourth Street, Miami, Florida 33132.

RHONDA A. ANDERSON, P.A.
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Coral Gables, Florida 33134
Telephone: (305) 444-1400
Facsimile: (305) 444-1487

By: _____
RHONDA A. ANDERSON, ESQ.
Florida Bar No.708038

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Undersigned counsel certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case:

Rhonda A. Anderson, Esq.
Hon. Ursula Ungaro-Benages, District Judge
Ramon Lopez
Susan Ponzoli, Assistant United States Attorney
Karen E. Rochlin, Assistant United States Attorney
Anne R. Schultz, Assistant United States Attorney

By:_____
RHONDA A. ANDERSON, ESQ.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 00-16074-F

RAMON LOPEZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

October 25, 2001

Before: EDMONDSON and WILSON, Circuit Judges.

BY THE COURT:

Upon reconsideration of this Court's order dated August 17, 2001, appellant's motion for a certificate of appealability is DENIED because appellant failed to make the requisite showing. See U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000).

Supreme Court, U.S.
FILED

NO. 011432 JAN 23 2002

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

RAMON LOPEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

RHONDA A. ANDERSON, ESQ.
RHONDA A. ANDERSON, P.A.
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34 pp

TABLE OF CONTENTS

- Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by A Person in Federal Custody dated April 20, 1997 1-7

- Report of Magistrate Judge entered on December 18, 1998 8-19

- Omnibus Order entered February 25, 1999 20-22

- Supplemental Report of Magistrate Judge entered on June 21, 2000 23-28

- Order Affirming Magistrate's Supplemental Report and Recommendation entered on September 29, 2000 29-30

- Order Denying Movant's Motion for Leave to File Motion for Reconsideration of Order Adopting Report and Recommendation of Magistrate Judge Denying Motion to Vacate under 28 U.S.C. § 2255 entered on November 3, 2000 31

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 28th day of March, 2002, to: ***Susan Ponzoli, Assistant United States Attorney,*** Appellate Division, 99 Northeast Fourth Street, Miami, Florida 33132, and ***Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530.

Rhonda A. Anderson, Esq.
Rhonda A. Anderson, P. A.
Counsel for *Ramon Lopez*
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MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Name of Movant	Prisoner No.	Case No.
RAMON LOPEZ	42004-004	91-317-CR-UUB

Place of Confinement
U.S.P. Atlanta, Georgia 30315

UNITED STATE OF AMERICA v. RAMON LOPEZ

Case No. 97-1422-CIV-UNGARGO-BENAGES
MAGISTRATE JUDGE SORRENTINO

MOTION

1. Name and location of court which entered the judgment of conviction under attack: United States District Court, for the Southern District of Florida, Miami Division.
2. Date of judgment of conviction: October 29, 1993.
3. Length of sentence: Life plus six (6) months.
4. Nature of offense involved (all counts): Counts 1: Conspiracy to Possess with Intent to Distribute Cocaine, 21 U.S.C. §846; a Class A Felony. Count 2: Possession with Intent to Distribute Cocaine, 21 U.S.C. §841(a)(1) a Class A Felony.
5. What was your plea? (Check one)
   (a) Not guilty. ☒
   (b) Guilty. ☐
   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details: Not applicable.

6. If you plead not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☒
   (b) Judge only ☐
7. Did you testify at trial?
   Yes ☐ No ☒
8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐
9. If you did appeal, answer the following:
   (a) Name of court: U.S. Court of Appeals for the Eleventh Circuit.
   (b) Result: Affirmed the conviction.
   (c) Date of result: Aril 24, 1995.
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petition applications or motions with respect to this judgment in federal court?
    Yes ☒ No ☐
11. If your answer to 10 was "yes," give the following information:
    (a) (1) Name of court: U.S. District Court, Miami Division.
    (2) Nature of proceeding: Motion for disclosure of the Grand Jury testimony and Concurrence Form.
    (3) Grounds raised: U.S. Customs had not jurisdiction to realized overseas operation (drugs) without special permit from the Department of Justice, nor from the Colombian Government in April 5, 1991. The evidency was unconstitutionally obtained, the government should not present it to the grand jury.
    (4) Did you receive an evidentiary hearing on your petition, application or motion?
    Yes ☐ No ☒
    (5) Result: This motion is pending response since Sept. 20, 1996.
    (6) Date of result:

(b) As to any second petition, application or motion, give the same information:
   (1) Name of court: Not applicable.
   (2) Nature of proceeding: Not applicable.
   (3) Grounds raised: Not applicable.
   (4) Did you receive an evidentiary hearing on your petition, application or motion? Not applicable.
   (5) Result: Not applicable.
   (6) Date of result: Not applicable.

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any application or motion?
   (1) First petition, etc. Not applicable.
   (2) Second petition, etc. Not applicable.

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not: Not applicable.

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a)

through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: District Court abuse its discretion when it admitted evidence of prior conviction and spurns notice of appeal, when name and nature or prior conviction raise risk of verdict.

Supporting FACTS (state *briefly* without citing cases or law): It was abuse of discretion to admit prior conviction records after two government' witness testify that defendant was previously involved in a separate cocaine case, and mentioned also by defendant's counsel in cross-examination to establish discrimilarity (sic). The evidence could have been satisfy by stipulation. There is no impediment to Court, after objection to denied notice of appeal by alleging confusion, misleading, irrelevant or not to this jury.

B. Ground two: Conviction was obtained by prosecution misconduct in violation of Brady doctrine.

Supporting FACTS (state *briefly* without citing cases or law): A) When produces erroneous information on Jenks Material; B) denied that informant indeed start the sting operation under the direction of government agent in response to defendant's motion to dismiss on claims of pre-targeted, vindictive & selective prosecution; C) when consciously allowed the main and only witness committed perjury in cross-examination and testimony.

C. Ground three: Conviction obtained by use of evidency (sic) gained unconstitutionally and in violation of treaties of United States after committing a crime.

Supporting FACTS (state *briefly* without citing cases or law): The U.S. Customs had not authority, jurisdiction, nor the special permit to realize an overseas operation from the Department of Justice, neither the Government of Colombia. Committing the crime of trespassing when flew in to Colombia territory in violation of FAA regulation; to flight into a foreign country without permit and International Rules of International Civil Aviation Organization (ICAO); using a civil aircraft for the purpose and with a false identification number.

D. Ground four: Denial of effective assistance of counsel at preliminary hearing - trial and sentence.

Supporting FACTS (state *briefly* without citing cases or law): 1) Failed to investigate and challenge the charges brought against defendant at pre-trial and trial stages, after the evidency (sic) shows clearly that should be different charges; 2) Failed to appeal the denial of pre-trial motion to dismiss for

government misconduct; 3) Failed to object that prior drug conviction is not final for purpose of enhanced at sentence, while that conviction is subject to direct appeal.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: B) Issues couldn't had been appeal since depend in part on evidency (sic) not in the records for direct appeal; C) It was obtained in part through the FOI/PA Request; D) Movant did not raise this issues on appeal because he was deprived of his constitutional right of the effective assistance of counsel at preliminary hearing, trial and sentence.
14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
    Yes ☐ No ☒
15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
    (a) At preliminary hearing: Scott Miller, 620 North Mastha Dr., Key Biscayne , FL 3314; Tom Dawson, 2300 South Fourth Street, Leavenworth, Kansas 66048.
    (b) At arraignment and plea:
    (c) At trial: Robert A. Rosenblatt, 66 West Flagler St., Miami, Fl 33130 (Penthouse Suite).
    (d) At sentencing: William M. Norris, Suite 1305, 1390 South Dixie Highway, Coral Gables, Fl 33146.
    (e) On appeal: Arthur J. Berger, Suite 506, 9200 South Dadeland Blvd., Miami, Fl 33156.
    (f) In any post-conviction proceeding:
    (g) On appeal from any adverse ruling in a post conviction proceeding:
16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☒ No ☐

Wherefore, movant prays, that the Court grant him all relief to which he may be entitled in this proceeding.

_____

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 20, 1997.

(date)

Ramon Lopez

Signature of Movant

Movant wish to express that he has not the transcript or other documents related to this case at this time and the information in basis to his recollection and belief.

R.L. (Initials)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 97-1422-CIV-UNGARGO-BENAGES
(91-0317-CR-UNGARO-BENAGES)
MAGISTRATE JUDGE SORRENTINO

RAMON LOPEZ,
Movant,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPORT OF MAGISTRATE JUDGE

I. Introduction

Ramon Lopez, a federal prisoner confined at the Federal Detention Center at Miami, Florida, filed a pro se motion to vacate pursuant to 28 U.S.C. §2255, attacking his convictions and sentences for conspiracy to possess with intent to distribute cocaine and possession of cocaine with intent to distribute following conviction after a jury trial in Case No. 91-0317-Cr-Ungaro-Benages.

Lopez is no longer proceeding pro se. He is now represented by Rhonda A. Anderson, Esquire. (DE# 344).

This cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2255 Cases in the United States District Courts.

For its consideration of this motion (DE# 318), the Court has the response of the government to an order to show cause with multiple exhibits (DE# 339), the movant's reply to the government's response (DE# 350), and the government's supplemental response in opposition to the movant's motion

for leave to invoke discovery, etc. (DE# 351).

II. Issues

Lopez raises the following claims:

1. The court abused its discretion when it admitted evidence of prior convictions and spurned his notice of appeal of a prior conviction.
2. His conviction was obtained by prosecutorial misconduct in violation of the Brady[1] doctrine.
3. His conviction was obtained by use of evidence gained unconstitutionally and in violation of FAA regulations.
4. Ineffective assistance of counsel who failed to:
   a. Investigate and challenge his charges at the pretrial and trial stage.
   b. Appeal the denial of pretrial motions to dismiss based on government misconduct.
   c. Object to sentencing enhancement based on a prior drug conviction, which was subject to direct appeal.
5. Attorney Miller significantly prejudiced the movant's ability to negotiate a plea agreement with the United States. (DE# 350 at ¶II).

III. Procedural and Factual History

The movant Ramon Lopez provided $50,000 in expense money to a confidential informant to hire a plane and crew to transport 300 kilograms of cocaine from La Guajira, Colombia to Miami, Florida.[2] The confidential informant later states that Lopez wanted the cocaine flown to his ranch. The 300 kilograms of cocaine were eventually brought into the United

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[1]Brady v, Maryland, 373 U.S. 83 (1963).

[2]The facts were gleaned from the Presentence Investigation Report. ("PSI")

States in an airplane flown by an undercover contract pilot for the United States Customs Service.

After the cocaine arrived in Miami, the pilot participated in a series of negotiations with Lopez concerning payment for the transportation of the cocaine. Eventually, codefendant Machado agreed to deliver $200,000 to the pilot for 200 kilograms of cocaine. Machado picked up the 200 kilograms of cocaine and left a 40 kilogram bale of cocaine with others. He was subsequently arrested, and he remaining 160 kilograms of cocaine were seized.

Ramon Lopez was indicted for conspiracy to possess with intent to distribute cocaine (Count 1) and possession with intent to distribute cocaine (Count 2) on April 24, 1991. (DE# 1). Lopez proceeded top jury trial, where he was found guilty as charged. (T/T at 1428).

The court sentenced Lopez to two concurrent life sentences, followed by five years of supervised release. An additional consecutive term of six months incarceration was imposed pursuant to 18 U.S.C. §3147. The sentences imposed as to counts 1 ans 2 were made concurrent to sentences previously imposed in Case Nos. 90-389-Cr-Davis and 92-395-Cr-Davis. The §3147 sentence is consecutive to the prior federal sentences. (DE# 265).

Arthur Joel Berger, appellate counsel, prosecuted a timely appeal, which raised the following claims:

1. The trial court erred when it admitted his prior conviction for the possession and conspiracy to possess five kilograms of cocaine.
2. The trial court erred in precluding him from introducing a certified copy of the Notice of Appeal of the judgment of conviction for a prior crime, which the government introduced as collateral crime evidence.

3. The trial court erred in admitting a statement of his to a confidential informant as co-conspirator hearsay.
4. The trial court erred in admitting hearsay testimony of a law enforcement officer pertaining to what a government informant told him about Lopez.
5. The trial court erred in its handling of a defense objection to a prejudicial factual assertion in the presentence report.

(DE# 339 Composite Ex. Appellant Brief at 1-2).

On April 24, 1995, the Court of Appeals affirmed. United States v. Lopez, 53 F.3d 1285 (11th Cir. 1995); cert denied. 516 U.S. 870 (1995).

IV. Statute of Limitations

The government claims that this motion should be dismissed as untimely pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA").

28 U.S.C. §2255 provides, in relevant part, as follows:

A 1-year time period of limitation shall apply to motion under this section. The limitation period shall run from the latest of- -

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered

through the exercise of due diligence.

The AEDPA took effect on April 24, 1996. The Eleventh Circuit Court of Appeals has adopted the now widely accepted one year equitable extension, so that a §2255 motion in a case which became final prior to April 24, 1996, must have been filed on or before April 23, 1997. Goodman v. United States, 151 F.3d 1335 (11th Cir. 1998).

On April 20, 1997, the movant dated and signed this motion under penalty of perjury. (DE# 318). The motion was file-stamped by the clerk's office on April 29, 1997. (Id).

The Eleventh Circuit Court of Appeals has not yet decided whether the "mailbox rule" applies to a pro se prisoner's filing of a petition or writ of habeas corpus or a motion to vacate. However, it is apparent that the majority of courts deem a pro se prisoner's pleading to be filed when delivered to prison officials, for purposes of AEDPA's one-year limitations period. Burns v. Morton, 134 F.3d 109 (3rd Cir. 1998)(applying "mailbox rule" to pro se §2254 petition); United States v. O'Kaine, 971 F.Supp. 1479 (S.D. Georgia 1997)(applying "mailbox rule" to pro se §2255 motion); Peterson v. Demske, 107 F.3d 92 (2nd Cir. 1997)(applying "mailbox rule" to pro se §2254 petition); In re Simms, 111 F.3d 45, (6th Cir. 1997)(applying "mailbox rule" to successive petitions and motions filed in the District Court after AEDPA went into effect).

In the absence of evidence to the contrary, it will be presumed that the movant delivered his motion for mailing on the day he dated and signed it under penalty or perjury, April 20, 1997. It is therefore timely pursuant tp the now generally recognized one year extension to the limitation period of the AEDPA.

V. Discussion

The government invokes a procedural bar as to claims one, two, and three.

There are three types of issues that a section 2255 motion cannot raise: (1) issues that were raised on direct appeal, absent

a showing of changed circumstances; (2) nonconstitutional issues that could have been but were not raised on direct appeal; and (3) constitutional issues that were not raised on direct appeal, unless the section 2255 movant demonstrates cause for the procedural default as well as actual prejudice from failure to appeal. Belford v. United States, 975 F.2d 310 (7th Cir. 1992), overruled on other grounds by Castillanos v. United States, 26 F.3d 717 (7th Cir. 1994).

A. Claim One

The government argues that claim one was already addressed in the petitioner's direct appeal. Review of Lopez' appellate brief reveals that claim one was raised as claim one and claim two of his direct appeal.

An issue resolved against a movant on direct appeal, cannot be relitigated in a §2255 motion. United States v. Frady, 455 U.S. 152, 166-168 (1982); Dermota v. United States, 895 F.2d 1324 (11th Cir. 1990), cert. denied, 498 U.S. 837 (1990); United States v. Johnson, 615 F.2d 1125, 1128 (5th Cir. 1980); United States v. Kalish, 780 F.2d 506, 508 (5th Cir. 1986).

B. Claims Two and Three

The government contends that claims two and three are procedurally barred because these claims should have been, but were not raised by Lopez in his direct appeal. In claim two, Lopez claims that his conviction was obtained by prosecutorial misconduct. In claim three, Lopez asserts that his conviction was obtained from the use of evidence obtained in violation of U.S. treaties and FAA regulations.

Lopez acknowledges that claims two and three were not raised on direct appeal. In an effort to overcome the procedural bar, Lopez asserts that he could not raise claim two on direct appeal, in part, because the evidence was not in the records for direct appeal. (DE# 318 ¶13). As for claim three, Lopez claims that he became aware of a basis for the claim, in part, through a freedom of Information ("FOIA") request. (Id).

Lopez' explanations fail to establish cause for the procedural default. Claims two and three address issues which could have been raised on direct appeal, but were not. Moreover, the movant does not state with any specificity what evidence became available to him at a later date. Consequently, claims two and three are procedurally barred.

C. Claim Four

In claim four, the movant asserts various ineffective assistance of counsel claims. Lopez was represented by different attorneys at the trial, sentencing, and appellate stages. He was originally represented by Scott A. Miller, Esquire. (DE# 43). Robert Alan Rosenblatt, esquire and Thomas M. Dawson, Esquire represented Lopez at trial (DE# 130); William M. Dawson, Esquire at sentencing (PSI); and Arthur Joel Berger, Esquire perfected Lopez' appeal. (DE# 339 Composite Exhibit, Appellate Brief).

A claim of ineffective assistance of counsel generally cannot not be raised on direct appeal where the claim has not been heard by the district court or a factual record developed. See United States v. Khoury, 901 F.2d 948, 969 (11th Cir. 1990) citing United States v. Edmondson, 818 F.2d 768, 769 (11th Cir. 1987)(per curiam); United States v. Rodriguez, 582 F.2d 1015, 1016 (5th Cir. 1978)(per curiam); United States v. Gray, 464 F.2d 632, 634 n.1 (8th Cir. 1972); United States v. Prince, 456 F.2d 1070, 1070-71 (5th Cir. 1972).

Nevertheless, if in a motion to vacate proceeding the movant was represented by different counsel on appeal and he offers no extrinsic evidence to support his claim of ineffective assistance, he will be procedurally barred by failure to pursue the issue on direct appeal. McCleese v., United States, 75 F.3d 1174, 1178 (7th Cir. 1996), and cases cited threat.

In an effort to overcome the procedural bar, the movant asserts ineffective assistance of counsel as to claim four. (DE# 318 ¶13).

A claim of ineffective assistance of counsel may constitute cause for failure to previously raise the issue. United States v.

Breckenridge, 93 F.3d 132 (4th Cir. 1996). Attorney error, however, does not constitute cause for a procedural default unless it rises to the level of ineffective assistance of counsel under the test enunciated in Strickland v. Washington, 466 U.S. 668 (1984).

Subclaim a

In subclaim a of claim four, the movant asserts that trial counsel failed to investigate and challenge charges at the pretrial and trial stage.

In order for the movant to prevail in federal court on a claim of ineffective assistance of counsel, the movant must establish that 1) his counsel's representation fell below an objective standard of reasonableness, and 2) but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). Thus, Lopez must show that his counsel's performance was below constitutional standards, and that he suffered prejudice as a result. A court may decline to reach the performance prong of the standard if it is convinced that the prejudice prong cannot be satisfied. Id. at 697; Waters v. Thomas, 46 F.3d 1506, 1510 (11th Cir. 1995).

Lopez claims that he was improperly charged for conspiracy to possess with intent t distribute cocaine and possession with intent to distribute cocaine. Defense counsel filed numerous pretrial motions on behalf of Lopez. (DE# 78-87). The movant makes no showing of what his attorney should have done differently. Aside from his blanket accusation, the movant fails to support his claim that he was improperly charged. The record clearly establishes that Lopez had already arranged for the purchase of the cocaine in Colombia and was on bond when he sought to hire a pilot to bring 300 kilograms of cocaine into the United States from Colombia. Lopez' concerns that police might be involved led him to ask Machado to continue negotiations between himself and the pilot.

The overwhelming evidence in this case clearly supports his convictions. The movant is not entitled to relief based on this claim of ineffective assistance of counsel.

Subclaim b

In subclaim b of claim four, the movant asserts that appellate counsel failed to appeal the denial of pretrial motions to dismiss based on governmental misconduct.

The standard for a claim of ineffective assistance on direct appeal is the same as that for ineffective assistance at trial. Matire v. Wainwright, 811 F.2d 1430, 1435 (11th Cir. 1987). That is, as required by Strickland v. Washington, 466 U.S. 688 (1984), the movant must establish that 1) his counsel's representation fell below an objective standard of reasonableness, and 2) but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been different.

Review of the movant's pretrial motion to dismiss reveals claims that the government pre-targeted Lopez and then fabricated evidence against him. (DE# 201 at 1-2). In its response, the government noted that Lopez' claim that he was pre-targeted was speculative. It stated that "The Federal Bureau of Investigation received unsolicited information that defendant Lopez was looking for an aircraft to bring 300 kilograms of cocaine from Colombia. A check of law enforcement databases enabled the FBI to identify the case agent with the United States Custom Service and the prosecutor already handling the pending indictment against the defendant for a five-kilogram cocaine transaction..." (DE# 207 at 10). The trial court denied this motion. (DE# 217).

The movant does not provide factual support which would support his claim of governmental misconduct. Bare and conclusory allegations of ineffective assistant of counsel which contradict the existing record and are unsupported by affidavits or other indicia of reliability, are insufficient to require a hearing or further consideration. See: Ferguson v. United States, 1699 F.2d 1071 (11th Cir. 1983); United States v.

Ammirato, 670 F.2d 552 (5th Cir. 1982); United States v. Sanderson, 595 F.2d 1021 (5th Cir. 1979); King v. United States, 565 F.2d 356 (5th Cir. 1978); Clayton v. Estelle, 541 F.2d 486 (5th Cir. 1976); Matthews v. United States, 533 F.2d 900 (5th Cir. 1976); Dugan v. United States, 521 F.2d 231 (5th Cir. 1975); Frank v. United States, 501 F.2d 173 (5th Cir. 1974). There was no basis for appeal as to this claim.

Subclaim c

In subclaim c of claim four, the movant asserts that counsel failed to object to a sentencing enhancement based on a prior drug conviction which was subject to direct appeal.

> The United States Sentencing Guidelines clearly states:
>
> The term "prior sentence" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea or nolo contendere, for conduct not part of the instant case.

U.S.S.G. §4A1.2 (1998).

There is no duty to raise issues on appeal which have little or no chance of success. Thus, appellate counsel is not required to raise meritless issues, Card v. Dugger, 911 F.2d 1494, 1520 (11th Cir. 1990), or issues which were not preserved and are procedurally barred on appeal, Bertolotti v. Dugger, 883 F.2d 1503, 1523 (11th Cir. 1989), cert. denied, 497 U.S. 1032 (1990); Jackson v. Dugger, 931 F.2d 712, 715 (11th Cir. 1991).

The guidelines do not include any exception for prior convictions which are subject to direct appeal, so that the movant is entitled to no relief based on this claim of ineffective assistance of counsel, either at sentencing or on appeal.

D. Claim Five

In claim five, the movant asserts that his original trial attorney, A. Scott Miller, Esquire, significantly prejudiced his ability to negotiate a plea agreement with the United States. Lopez contends that Miller did not advise him that Miller was the target of a federal investigation during the time he represented him. Lopez also contends that Miller failed to

negotiate a package plea for all his cases and did not provide a copy of the proposed plea to his substitute counsel, Thomas M. Dawson, Esquire, and Robert Alan Rosenblatt, Esquire. The record belies this claim.

Scott Miller originally represented Lopez. (DE# 43). On March 10, 1991, Miller sought substitution of counsel. (DE# 129). That same day, attorneys Dawson and Rosenblatt entered appearances on behalf of Lopez. (DE# 130). Prior to his withdrawal as counsel, Miller sought a plea agreement in this case. (DE# 205 Attachment). In a letter dated June 18, 1991, the prosecutor outlined the conditions fr an agreement. (Id).

In a letter dated June 23, 1992, defense counsel Dawson also attempted to negotiate a plea agreement. (DE# 351 Composite Exhibit June 23, 1992 letter). The letter discusses the government's "negative attitude" toward a plea agreement. Lopez asserts that his negative attitude was caused by Miller. N a response letter to the government dated June 25, 1992, the government expressly informed attorney Dawson that it "is not interested in and will not agree to any cooperation plea agreement" with Lopez. (DE# 351 Composite Exhibit June 25, 1993 letter).

Lopez proceeded to trial on July 8, 1993, over two years after substitute counsel entered the case. The record demosntrates that attorneys Miller and Dawson both sought a plea agreement in Lopez' cases. However, the government is not required to extend a plea offer in any case. The movant fails to demonstrate how attorney Miller prejudiced his ability to negotiate a plea agreement with the government. Lopez has not met the requirements of Strickland v. Washington, supra, in connection with his claims of ineffective assistance of counsel.

VI. Conclusion

It is therefore recommended that this motion to vacate be denied.

Objections to this report may be filed with the District

Judge within ten days of receipt of a copy of the report.
Dated: December 18, 1998.

Charlene H. Sorrentino
United States Magistrate Judge

cc: Rhonda A. Anderson, Esq.
2420 Coral Way
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Karen E. Rochlin, AUSA
99 N.E. 4th Street
Miami, FL 33132

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 97-1422-CIV-UNGARO-BENAGES
(91-0317-CR-UNGARO-BENAGES)

RAMON LOPEZ,
Movant,

vs.

UNITED STATES OF AMERICA,
Respondent.

OMNIBUS ORDER

THIS CAUSE is before the Court upon Movant's pro se Motion to Vacate Convictions and Sentences pursuant to 28 U.S.C. §2255 ("§2255 Motion"), filed April 29, 1987; Movant's Motion for Leave to Invoke Discovery and/or Expand Records ("Discovery Motion") (DE-345), filed July 20, 1998; and Movant's Motion for reconsideration and Stay of Action Pending Ruling on Disclosure of Discovery in related Matter ("Motion for Reconsideration") (DE-356), filed January 21, 1999.

THE MATTER was referred to the Honorable Charlene Sorrentino, United States Magistrate Judge. A Report of Magistrate Judge ("Report"), dated December 18, 1998 has been filed, recommending that Movant's Motion to Vacate be denied on all counts. In arriving at this recommendation, Magistrate Sorrentino considered the parties' allegations and submissions regarding Movant's Discovery Motion, however rejected Movant's arguments therein as meritless in light of Respondent's submissions. *See* DE-346, 351. The Magistrate, however, did not specifically rule on Movant's Discovery Motion. Movant, now represented by counsel, objects to the

Report. Rather than citing specific objections, he has filed the aforementioned Motion for Reconsideration and Stay of Action Pending Ruling on Disclosure of Discovery in Related Matter.[1] Respondent did not respond to Movant's Motion for Reconsideration. Movant's Motion for Leave to Invoke Discovery is fully briefed and ripe for disposition.

THE COURT has made a de novo review of the Motions, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Magistrate Sorrentino's Report of Magistrate Judge is RATIFIED, AFFIRMED, AND ADOPTED insofar as it recommends denial of Claims I, II, III, and IV contained in Movant's §2255 Motion. Claims I, II, III, and IV of Movant's Motion to Vacate Convictions and Sentences pursuant to 28 U.S.C. §2255 are DENIED. It is further

ORDERED AND ADJUDGED that Movant's Motion for Leave to Invoke Discovery and/or Expand Records (DE-345) is DENIED. It is further

ORDERED AND ADJUDGED that Movant's Motion for Reconsideration and Stay of Action Pending Ruling on Disclosure of Discovery in related Matter (DE-356) is GRANTED insofar as it pertains to Claim V of Movant's §2255 Motion. As it pertains to Claim V, this cause is remanded for reconsideration in light of Movant's allegation that attorney Miller never informed him of an available plea offer or pursued plea negotiations on his behalf. Insofar as Movant's Motion pertains to any other Claim, Movant's

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[1]Movant's "related matter" is a similar §2255 Motion filed by Movant in another case currently under consideration before Chief Judge Davis and Magistrate Garber. *See* 97-1875-CIV-DAVIS and 90-0389-CR-DAVIS. In that matter, Movant has made allegations similar to those in the present matter's Claim V.

Motion for Reconsideration is DENIED. Upon remand, the Magistrate should consider whether there are facts sufficient to support this allegation and, if so, whether Movant has met his burden under the first prong of *Strickland v Washington*, 466 U.S. 688 (1984). If so, in accordance with the standards set forth in *Strickland*, the magistrate should consider whether there is a reasonable probability that the result of the proceedings would have been different. *See id.* Thereafter, the Magistrate should make a second Report and Recommendation as to the appropriate disposition of this Claim. Accordingly, this cause is remanded to the Magistrate Sorrentino for further consideration in light of the above issues.

DONE AND ORDERED in Chambers at Miami, Florida, this 25 day of February, 1999.

URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
Rhonda Anderson, Esq.
Karen Rochlin, AUSA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 97-1422-CIV-UNGARGO-BENAGES
(91-0317-CR-UNGARO-BENAGES)
MAGISTRATE JUDGE SORRENTINO

RAMON LOPEZ,
Movant,

vs.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL REPORT OF MAGISTRATE JUDGE

Ramon Lopez, a federal prisoner currently confined at U.S.P. Lewisburg in Lewisburg, Pennsylvania, filed a pro se motion to vacate pursuant to 28 U.S.C. §2255, attacking his conviction and sentence imposed pursuant to a guilty verdict in Case No. 91-0317-Cr-Ungaro-Benages. Lopez is now represented by Rhonda A. Anderson, Esquire. (DE# 344).

A report recommending the denial of this motion to vacate was entered on December 18, 1998. (DE# 342). On February 25, 1999, the Honorable Ursula Ungaro-Benages, District Judge, entered an order adopting the recommendations as to Claims I., II, III, and IV; and remanding for reconsideration of Claim V. (DE# 358).

Lopez asserts in Claim V that his trial counsel, A. Scott Miller, Esquire, failed to advise him of an available plea offer and failed to pursue plea negotiations on his behalf. He raised the same claim in a motion to vacate in Case No. 97-1875-Civ-Ungaro-Benages, challenging Case No. 90-389-Cr-Davis. Miller represented Lopez in both cases, and both cases would

have been governed by the same plea bargain agreement. (DE# 369; Ex. K and DE# 374).

The record reveals that Miller sought a plea agreement in this case, and the government outlined the conditions for a plea agreement.. (DE# 205 Attachment and DE# 374; Ex. K). However, the government developed a "negative attitude" toward an agreement. (DE# 351; Composite Exhibit June 23, 1992 letter). Lopez asserts that this negative attitude was caused by Miller. The government stated in a letter that it "[was] not interested and [would] not agree to any cooperation plea agreement" with Lopez. (DE# 351 Composite Exhibit June 25, 1993 letter). The government is not required to extend a plea offer in any case.

Moreover, when Lopez raised the same claim in the motion to vacate in Case No. 97-1875-Civ-Ungaro-Benages, challenging Case No. 90-389-Cr-Davis, Magistrate Judge Barry L. Garber recommended that the motion to vacate be denied. The Honorable Edward B. Davis, Chief Judge, entered and order adopting the report in part, and remanding for consideration of two claims, 1) that Scott Miller, Esquire, labored under an actual conflict of interest which resulted in his persuading Lopez to proceed to trial instead of cooperating with the government, and 2) that Miller rendered ineffective assistance by failing to advise Lopez of a plea offer. (Case No. 90-389-Cr-Davis; DE# 376).

Magistrate Judge Garber conducted evidentiary hearings on June 10, 1999 and November 16, 1999, and entered a second supplemental report and recommendation thereafter. (Case NO. 97-1422-Civ-Ungaro-Benages; DE# 374 and Case No. 90-389-Cr-Davis; DE# 408). Thereafter, he made the following findings (Case No. 90-389-Cr-Davis; DE# 408):

> It is clear to the Court that petitioner was aware that a plea agreement had been proffered by the government. An examination of the transcript pf the sentencing that took place on January 9, 1992 is revealing in that regard. Mr.

> Miller advised the sentencing Court that "there is no question in this case that Mr. Lopez, myself, AUSA Rochlin, and the agents have discussed plea negotiations." [Transcript of sentencing, at page 10.] Further, and most telling, is Mr. Miller's statement: "The bottom line is that mr. Lopez couldn't come to terms with the Government's offer. That's the bottom line. So he exercised his right to go to trial." [Transcript of sentencing, at page 10.] Both Miller and petitioner acknowledge that the choice of cooperation or proceeding to trial belonged solely to petitioner.
>
> If the petitioner was not aware of any offer that had been submitted by the government, the most basic logic dictates that he would have made some remark when reference was made to the "government's offer," and reference to "plea negotiations" made by his attorney at the sentencing. In fact, petitioner, in his remarks to the Court, clearly stated that "[I] have tried every way possible to reach an agreement, just like my attorney said, with the Government." [Transcript of sentencing, at page 15.] It thus appears to the undersigned that petitioner was advised of the existence of a plea offer by his attorney, which he could not and did not accept. The Court finds attorney Miller's testimony tat he advised the petitioner of the plea agreement and its contents to be credible and supported by the events that occurred at the sentencing regarding same. (Case No. 90-389-Cr-Davis; DE# 408 at 2-3).

When considering if there was prejudice, Magistrate Judge Garber stated:

At the hearing conducted on June 10, 1999 the Court heard the testimony of AUSA Karen Rochlin who prosecuted this cause at trial. Ms. Rochlin testified *inter alia* that "...I had no interest in his cooperation. Partly because it seemed to me, if he couldn't even get through or commence a debriefing, I was concerned how he would hold up on a witness stand under cross examination. Also, at that point, I was beginning to receive information in detail, first from the North Miami Beach Police Department, as time went on, about other allegations concerning Mr. Lopez. So with that information I became convinced that it would be inappropriate to accept cooperation from Mr. Lopez." [Transcript of sentencing, at pages 52-53].

It is not clear to the Court that the government had no interest in seeking or receiving cooperation from the petitioner. Ms. Rchlin recounts that "I was contacted by Mr. Miller. And he told me that he wanted me to send him a draft plea agreement – a draft cooperation plea agreement for Mr. Lopez. And in that phone conversation I told him that I was no longer interested in doing that. He asked me to send him the document anyway. And we argued about it." ... "It was a strange conversation. I was trying to tell Mr. Miller that I was not interested in his client's cooperation any more, and there was simply no way I was going to go forward with a cooperation plea agreement on behalf of Ramon Lopez. Mr. Miller kept insisting that I sent [sic] him the document any way." [Transcript of sentencing, at page 53].

> Although AUSA Rochlin inexplicably condescended and sent a plea agreement to mr. Miller, she testified that "he should have no expectation what so ever that anything would follow from it. And then I was a little - I guess I was some what concerned about it because I told him that I never wanted to hear about the document or see it again". It is thus apparent to the Court that the government would not and did not expect to enter into a plea agreement with the petitioner and such position was related to petitioner's attorney by AUSA Rochlin. Accordingly, given the government's unwillingness to accept a negotiated plea from the petitioner based upon his cooperation, he was not prejudiced. Petitioner has also failed to present any evidence that he would have accepted a plea offer. United States v. Barber, 808 F.Supp. 361, 378 (D.N.J. 1992).
>
> The record in this cause does not reveal petitioner's willingness to provide cooperation in his cases or as to other persons involved in narcotics violations. Indeed, efforts to proceed in such direction at a debriefing resulted in emotional outbursts from the petitioner. [Transcript of November 16, 1999 hearing at pages 51-53, 60-61, and 63-64; also, transcript of March 12, 1998 hearing at pages 35-36].

Both Case No. 90-389-Cr-Davis and Case No. 91-317-Cr-Ungaro-Benages involved the same trial attorney, A. Scott Miller, Esquire. The claims are the same in each case. Magistrate Judge Garber conducted evidentiary hearings to explore the merits of the allegation, and determined that there was no merit.

It is therefore recommended that Claim V of this motion

to vacate sentence be denied.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

Dated: June 21, 2000.

Charlene H. Sorrentino
United States Magistrate Judge

cc: Rhonda A. Anderson, Esq.
2420 Coral Way
Miami, FL 33145

Karen E. Rochlin, AUSA
99 N.E. 4th Street
Miami, FL 33132

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 97-1422-CIV-UNGARGO-BENAGES
(91-0317-CR-UNGARO-BENAGES)

RAMON LOPEZ,
Movant,

vs.

UNITED STATES OF AMERICA,
Respondent.

ORDER AFFIRMING MAGISTRATE'S SUPPLEMENTAL REPORT AND RECOMMENDATION

THIS CAUSE is before the Court upon Movant's Motion to Vacate Convictions and Sentences pursuant to 28 U.S.C. §2255, filed April 29, 1987. The Honorable Charlene Sorrentino, United States Magistrate Judge issued a Report and recommendation denying all five counts of Movant's Motion on December 18, 1998. In an Order dated February 25, 1999, this Court remanded Count V to Magistrate Sorrentino to consider Movant's allegations that attorney Miller never informed him of an available plea offer or pursued plea negotiations on his behalf. (DE# 358). Magistrate Sorrentino, issued a Supplemental Report and Recommendation ("Report") dated June 21, 2000, recommending that Count V of Movant's Motion to vacate be denied. Movant filed objections and the Government responded.

THE COURT has conducted a *de novo* review of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that Magistrate

Sorrentino's Report is RATIFIED, AFFIRMED, AND APPROVED. Movant';s Motion is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 29 day of September, 2000.

URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
Magistrate Judge Sorrentino
counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 97-1422-CIV-UNGARGO-BENAGES
(91-0317-CR-UNGARO-BENAGES)

RAMON LOPEZ,
Movant,

vs.

UNITED STATES OF AMERICA,
Respondent.

ORDER

THIS CAUSE is before the Court upon Movant's Motion for Leave to File Motion for Reconsideration of Order Adopting Report and recommendation of Magistrate Judge Denying Motion to Vacate under 28 U.S.C. §2255, filed October 30, 2000.

THE COURT has upon considered the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that said Motion is hereby DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 3 day of November, 2000.

URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record